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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
*Petitioners,*

*vs.*

BEN YELLEN, et al.,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF LANDOWNER PETITIONERS

CHARLES W. BENDER
PATRICK LYNCH
JAMES V. SELNA
JOHN F. DAUM
611 West Sixth Street
Los Angeles, California 90017
(213) 620-1120
*Attorneys for Petitioners*
*John M. Bryant, et al.*

*Of Counsel:*
O'MELVENY & MYERS

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| QUESTIONS PRESENTED | 3 |
| STATEMENT OF THE CASE | 3 |
| Petitioners | 3 |
| Respondents | 3 |
| Proceedings Below | 4 |
| HISTORY OF THE DISPUTE | 5 |
| Early Irrigation History in Imperial Valley | 5 |
| The General Reclamation Laws | 6 |
| The Boulder Canyon Project Act | 8 |
| The All-American Canal Contract | 11 |
| *Hewes v. All Persons* | 12 |
| Administrative Practice as to Acreage Limitation | 14 |
| The People Affected by the Decision Below | 18 |
| SUMMARY OF ARGUMENT | 21 |
| 1. Statutory Construction | 21 |
| 2. Federal Respect for State Law and State Court Judgments | 22 |
| 3. Respondents' Lack of Standing | 23 |
| ARGUMENT | 24 |
| I. INTRODUCTION: THE DECISION BELOW IS WRONG IN THE FUNDAMENTAL SENSE THAT IT IS UNFAIR TO THE PEOPLE OF IMPERIAL VALLEY WHO RELIED ON THE WORD OF THE GOVERNMENT | 24 |

Page

II. THE TERMS OF THE BOULDER CANYON PROJECT ACT SHOW THAT THE 1928 CONGRESS DID NOT INTEND TO IMPOSE ACREAGE LIMITATION IN IMPERIAL VALLEY..... 27

A. The Congressional Mandate in § 6 for Satisfaction of Present Perfected Rights, Which Was Intended Specifically to Protect the Existing Water Uses in Imperial Valley, Negates Any Intention to Impose Acreage Limitation..... 29

B. Section 1 of the Project Act Indicates a Congressional Understanding that Acreage Limitation Was Not Applicable to Imperial Valley..... 34

C. The Inclusion in § 9 of an Acreage Limitation Provision as to Public Lands and the Omission of any Corresponding Provision for Acreage Limitation as to Privately-Owned Lands Strongly Indicate that Congress Did Not Intend Imposition of Acreage Limitations on Private Lands..... 36

D. Section 4(b) of the Project Act Establishes a Contracting System Plainly Inconsistent with That of § 46 of the Omnibus Adjustment Act of 1926..... 37

E. The General References to Reclamation Law in § 14 And Elsewhere Have a Reasonable Meaning Which Does Not Imply Application of Acreage Limitation Requirements in Imperial Valley..... 39

III. THE LEGISLATIVE HISTORY OF THE PROJECT ACT AS A WHOLE CLEARLY INDICATES THAT CONGRESS DID NOT INTEND TO APPLY ACREAGE LIMITATIONS TO IMPERIAL VALLEY..... 42

A. Congress Understood That An Explicit Provision Would Be Needed If It Wished To Impose Acreage Limitation in Imperial Valley, And Congress Deliberately Excluded Such A Provision From The Bill Adopted..... 44

1. The Hearings on the Swing-Johnson Bills show that Congress did not intend that land limitation provisions would be made applicable to Imperial Valley merely by general references to the Reclamation Law..... 44



Page

2. Insertion of an acreage limitation provision, and its deletion from the final bill..... 46

(a) H.R. 9826..... 46

(b) S. 3331..... 47

(c) S. 728 — The Boulder Canyon Project Bill.. 48

B. The Legislative History Confirms that the Section 1 and Section 4(b) References to Reclamation Law Repayment Were Not Intended to Apply Acreage Limitation..... 51

C. Overview of the Statute's Language and History..... 53

IV. THE NINTH CIRCUIT'S REFUSAL TO HONOR THE STATE-COURT CONFIRMATION JUDGMENT IN *HEWES v. ALL PERSONS* VIOLATED FUNDAMENTAL PRINCIPLES OF RECLAMATION LAW AS WELL AS THE DUTY TO ACCORD THAT JUDGMENT FULL FAITH AND CREDIT..... 56

V. RESPONDENTS LACK STANDING..... 64

VI. CONCLUSION..... 69

## TABLE OF AUTHORITIES

### FEDERAL CASES

#### United States Supreme Court Cases


| | Page |
|---|---|
| *Arizona* v. *California*, 373 U.S. 546 (1963) | 10, 21, 27, 28, 29, 33, 42, 53 |
| *Arizona* v. *California*, 376 U.S. 340 (1964) | 31 |
| *Arizona* v. *California*, 439 U.S. 419 (1979) | 31 |
| *California* v. *United States*, 438 U.S. 645 (1978) | 3, 22, 23, 53, 54, 58 |
| *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940) | 64 |
| *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1974) | 65 |
| *F.H.A.* v. *Darlington, Inc.*, 358 U.S. 84 (1958) | 26 |
| *Grubb* v. *Public Utilities Comm'n.*, 281 U.S. 470 (1930) | 62 |
| *Hastings & Dakota R. Co.* v. *Whitney*, 132 U.S. 357 (1889) | 26 |
| *Hawley* v. *Diller*, 178 U.S. 476 (1900) | 26 |
| *Hewitt* v. *Schultz*, 180 U.S. 139 (1901) | 26 |
| *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275 (1958) | 23, 62, 64 |
| *Kern River Co.* v. *United States*, 257 U.S. 147 (1921) | 26 |
| *Kindred* v. *Union Pacific R. R.*, 225 U.S. 582 (1912) | 26 |
| *LaRogue* v. *United States*, 239 U.S. 62 (1915) | 26 |
| *Logan* v. *Davis*, 233 U.S. 613 (1914) | 26 |
| *McLaren* v. *Fleischer*, 256 U.S. 477 (1921) | 26 |
| *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294 (1933) | 26 |
| *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969) | 26 |
| *Saxbe* v. *Bustos*, 419 U.S. 65 (1974) | 26 |





| | Page |
|---|---|
| *Simon* v. *Eastern Kentucky Welfare Rights Org'n.*, 426 U.S. 26 (1976) | 64, 68 |
| *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322 (1924) | 26 |
| *Udall* v. *Tallman*, 380 U.S. 1 (1965) | 25-26, 27, 55-56 |
| *United States* v. *Burlington & Mo. River R. Co.*, 98 U.S. 334 (1878) | 26 |
| *United States* v. *Hammers*, 221 U.S. 220 (1911) | 26 |
| *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) | 26 |
| *United States* v. *Jackson*, 280 U.S. 183 (1930) | 26 |
| *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915) | 26-27 |
| *United States* v. *Minnesota*, 270 U.S. 181 (1926) | 26 |
| *United States* v. *Moser*, 266 U.S. 236 (1924) | 64 |
| *Warth* v. *Seldin*, 422 U.S. 490 (1975) | 23, 64-68 |
| *Zenith Radio Corp.* v. *United States*, 437 U.S. 423 (1978) | 26 |


#### Other Federal Cases


| | |
|---|---|
| *Bowker* v. *Morton*, 541 F.2d 1347 (9th Cir. 1976) | 68 |
| *Brown* v. *Chastain*, 416 F.2d 1012 (5th Cir. 1969) | 62 |
| *Deane Hill Country Club, Inc.* v. *City of Knoxville*, 379 F.2d 321 (6th Cir. 1967) | 62 |
| *PI Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012 (1st Cir. 1972) | 62 |
| *San Joaquin & Kings River Canal & Irr. Co.* v. *Stanislaus County*, 191 Fed. 875 (C.C.N.D. Cal. 1911) | 32 |
| *Yellen* v. *Hickel*, 352 F.Supp. 1300 (S.D. Cal. (1972)), *vacated*, 559 F.2d 509 (9th Cir. 1977) | 65-66 |

## OTHER CASES


| | Page |
|---|---|
| *Bent* v. *Second Extension Water Co.*, 51 Cal. App. 648, 197 Pac. 657 (1921) | 32 |
| *Butte County Water Ass'n.* v. *Railroad Comm'n.*, 185 Cal. 218, 196 Pac. 265 (1921) | 33 |
| *Byington* v. *Sacramento Valley West Side Canal Co.*, 170 Cal. 124, 148 Pac. 791 (1915) | 33 |
| *Erwin* v. *Gage Canal Co.*, 226 Cal. App. 2d 189, 37 Cal. Rptr. 901 (1964) | 32 |
| *Fellows* v. *City of Los Angeles*, 151 Cal. 52, 90 Pac. 137 (1907) | 33 |
| *Henderson* v. *Oroville-Wyandotte Irr. Dist.*, 207 Cal. 215, 277 Pac. 487 (1929) | 32 |
| *Hewes* v. *All Persons, Nos.* 15460, 15454 (Superior Court, California 1933) Ptn. Apx. 105a | 12-13, 14, 17, 22-23, 56-64 |
| *Hillcrest Irr. Dist.* v. *Brose*, 24 Idaho 376, 133 Pac. 663 (1913) | 59 |
| *In re Owl Creek Irr. Dist.*, 71 Wyo. 30, 253 P.2d 867 (1953) | 59 |
| *Ivanhoe Irr. Dist.* v. *All Parties*, 47 Cal. 2d 597, 306 P.2d 824 (1957), *rev'd, Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275 (1958) | 14, 59, 61-62, 64 |
| *Ivanhoe Irr. Dist.* v. *All Parties*, 53 Cal. 2d 692, 350 P.2d 69, 3 Cal. Rptr. 317 (1960) | 32, 63 |
| *Leavitt* v. *Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. 404 (1909) | 32 |
| *Madera Irr. Dist.* v. *All Persons*, 47 Cal. 2d 581, 306 P.2d 886 (1957) | 64 |
| *McLean* v. *Truckee Carson Irr. Dist.*, 49 Nev. 278, 245 Pac. 285 (1926) | 59 |
| *Orcutt* v. *Pasadena Land & Water Co.*, 152 Cal. 599, 93 Pac. 497 (1908) | 32 |
| *Pioneer Irr. Dist.* v. *Stone*, 23 Idaho 344, 130 Pac. 382 (1913) | 59 |
| *Riverside Land Co.* v. *Jarvis*, 174 Cal. 316, 163 Pac. 54 (1917) | 32 |





| | Page |
|---|---|
| *San Bernardino Mun. Water Dist.* v. *Meeks & Daley Water Co.*, 226 Cal. App. 2d 216, 38 Cal. Rptr. 51 (1964) | 32, 33 |
| *Santa Barbara County Water Agency* v. *All Persons*, 47 Cal. 2d 699, 306 P.2d 875 (1957) | 64 |
| *South Pasadena* v. *Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490 (1908) | 32 |


### Federal Statutes


| | Page |
|---|---|
| *Popular Name Citations* | |
| Reclamation Act of 1902 (Act of June 17, 1902) 32 Stat. 338 | |
| § 3 (43 U.S.C. § 432) | 36, 42 |
| § 4 (43 U.S.C. § 416) | 63 |
| § 5 (43 U.S.C. § 431) | 6, 12, 13, 34-35, 36, 61 |
| Reclamation Extension Act of 1914 (Act of August 13, 1914) 38 Stat 686 | |
| § 12 (43 U.S.C. § 418) | 46 |
| Act of May 15, 1922 | |
| § 1 (43 U.S.C. § 511) | 59-60 |
| Fact Finders Act (Act of December 5, 1924) 43 Stat. 701 | |
| § 4 (43 U.S.C. § 433) | 42 |
| Omnibus Adjustment Act of 1926 (Act of May 25, 1926) 44 Stat. 649 | |
| § 46 (43 U.S.C. § 423e) | 7-8, 11, 12, 20, 21, 35, 37-39, 46, 47-48, 49 |
| Boulder Canyon Project Act (Act of December 21, 1928) 45 Stat. 1057 | |
| § 1 (43 U.S.C. § 617) | 11, 21, 27, 28, 34-36, 39, 41, 47, 51-53 |
| § 4 (43 U.S.C. § 617c) | 11, 13, 21, 27, 28, 37-39, 41, 46, 51-53, 63 |

| | Page |
|---|---|
| § 5 (43 U.S.C. § 617d) | 11, 28, 41, 61 |
| § 6 (43 U.S.C. § 617e) | 10, 21, 28, 29-34 |
| § 8 (43 U.S.C. § 617g) | 27-28, 41 |
| § 9 (43 U.S.C. § 617h) | 21, 28, 36-37, 41-42, 49-50, 63 |
| § 10 (43 U.S.C. § 617i) | 40-41 |
| § 13 (43 U.S.C. § 617*l*) | 28 |
| § 14 (43 U.S.C. § 617m) | 29, 39-42, 44-53 |
| § 18 (43 U.S.C. § 617q) | 29, 57, 60, 63 |
| Colorado River Compact, 70 *Cong. Rec.* 324 (1928) | |
| Article VIII | 10, 30 |
| Judicial Code | |
| § 1738 (28 U.S.C. § 1738) | 23 |

*United States Code Citations*

| | |
|---|---|
| 28 U.S.C. § 1738 | 23 |
| 43 U.S.C. § 186 | 42 |
| 43 U.S.C. § 416 | 63 |
| 43 U.S.C. § 418 | 46 |
| 43 U.S.C. § 423e | 7-8, 11, 20, 21, 35, 37-39, 47-48, 49, 64 |
| 43 U.S.C. § 431 | 6, 12, 13, 34-35, 36, 61 |
| 43 U.S.C. § 432 | 36, 42 |
| 43 U.S.C. § 433 | 42 |
| 43 U.S.C. § 511 | 59-60 |
| 43 U.S.C. § 617 | 11, 21, 27, 28, 34-36, 39, 41, 47, 51-53 |
| 43 U.S.C. § 617c | 11, 13, 21, 27, 28, 37-39, 41, 46, 51-53, 63 |
| 43 U.S.C. § 617d | 11, 28, 41, 61 |
| 43 U.S.C. § 617e | 10, 21, 28, 29-34 |
| 43 U.S.C. § 617g | 27-28, 41 |





| | Page |
|---|---|
| 43 U.S.C. § 617h | 21, 28, 36-37, 41-42, 49-50, 63 |
| 43 U.S.C. § 617i | 40-41 |
| 43 U.S.C. § 617*l* | 28 |
| 43 U.S.C. § 617m | 29, 39-42, 44-53 |
| 43 U.S.C. § 617q | 29, 57, 60, 63 |

**Federal Rules of Civil Procedure**

| | |
|---|---|
| Rule 24, F.R. Civ.P. | 23 |

**Code of Federal Regulations**

| | |
|---|---|
| 43 C.F.R. § 230.70 | 34 |

**Other Statutes**

| | |
|---|---|
| California Irrigation District Act of 1917, 1917 Cal. Stat. 243 | 57 |
| California Irrigation District Act of 1897, 1897 Cal. Stat. 254 | 57 |
| California Water Code, § 23220 | 59 |

**LEGISLATIVE HISTORY MATERIALS**

**Senate Bills**

| | |
|---|---|
| S.3511, 67th Cong., 2d Sess. (1922) | 43 |
| S.727, 68th Cong., 1st Sess. (1923) LX-C | 43 |
| S.1868, 69th Cong., 1st Sess. (1925) LX-G | 43 |
| S.3331, 69th Cong., 1st Sess. (1926) LX-F | 43, 47-48 |
| S.728, 70th Cong., 1st Sess. (1927) LX-J | 43-44, 48-53 |
| S.1274, 70th Cong., 1st Sess. (1927) | 49 |

Page

**House Bills**

H.R. 11449, 67th Cong., 2d Sess. (1922) Pl. Ex. 66h ..... 43

H.R. 2903, 68th Cong., 1st Sess. (1923) LX-B ..... 43, 46

H.R. 6251, 69th Cong., 1st Sess. (1925) LX-D ..... 43

H.R. 9826, 69th Cong., 1st Sess. (1926) LX-E ..... 43, 44-47, 48

H.R. 5773, 70th Cong., 1st Sess. (1927) LX-I ..... 43-44, 48, 50, 51

**Senate Reports**

*S. Rep. No. 654,* 69th Cong., 1st Sess. (1926) ..... 43

*S. Rep. No. 592,* 70th Cong., 1st Sess. (1928) LX-DD(J) [excerpts] ..... 43, 48-49, 52

**House Reports**

*H. Rep. No. 1657,* 69th Cong., 2d Sess. (1926) Pl. Ex. 68h ..... 43

*H. Rep. No. 918,* 70th Cong., 1st Sess. (1928) Pl. Ex. 68j ..... 11, 43

**Senate Hearings**

*Hearings on S.727,* Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess. (1924-25) ..... 43

*Hearings Pursuant to S. Res. 320,* Sen. Comm. on Irr. and Recl., 69th Cong., 1st Sess. (1925) LX-DD(C) [excerpts] ..... 10, 30, 43

*Hearings on S.728 and S.1274,* Sen. Comm. on Irr. & Recl., 70th Cong., 1st Sess. (1928) ..... 43

*Hearings on H.R. 13710,* Sen. Subcomm. on Appropriations, 72d Cong., 2d Sess. (1933) ..... 60

*Hearings on H.R. 3961,* Subcomm. of Sen. Comm. on Commerce, 78th Cong., 2d Sess. (1944) ..... 15

*Hearings on S.912,* Subcomm. of Sen. Comm. on Public Lands, 80th Cong., 1st Sess. (1947) ..... 16

*Hearings on S.1385,* 81st Cong., 1st Sess. (1949) 16





Page

*Hearings on S.1425, S.2541 and S.3448,* 85th Cong., 2d Sess. (1958) ..... 17

*Acreage Limitations on Bureau of Reclamation Projects,* Hearings on S.242, S.1812, S.310, S.2606 and S.2818, Subcomm. on Public Lands and Resources of Sen. Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. (1978) 25

**House Hearings**

*Hearings on H.R. 11449,* House Comm. on Irr. of Arid Lands, 67th Cong., 2d Sess. (1922-23) 43

*Hearings on H.R. 2903,* House Comm. on Irr. & Recl., 68th Cong., 1st Sess. (1924) LX-DD(B) [excerpts] ..... 30, 43, 46

*Hearings on H.R. 8836,* 68th Cong., 1st Sess. (1924) ..... 8, 20

*Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. (1926) LX-DD(D) [excerpts] 11, 31, 43, 44-45

*Hearings on H.R. 9826,* House Comm. on Rules, 69th Cong., 2d Sess. (1927) ..... 43

*Hearings on H.R. 5773,* House Comm. on Irr. & Recl., 70th Cong., 1st Sess. (1928) ..... 43

*Hearings on H.R. 5434,* House Comm. on Irr. & Recl., 79th Cong., 2d Sess. (1946) ..... 8

*Hearings on Irrigation and Reclamation,* Subcomm. of House Comm. on Public Lands, 80th Cong., 1st Sess. (1947) ..... 16

*Hearings on H.R. 6705,* 80th Cong., 2d, Sess. (1949) ..... 16

*Hearings on H.R. 3790,* 82d Cong., 1st Sess. (1951) ..... 16

*Hearings on H.R. 7176,* 82d Cong., 2d Sess. (1952) ..... 16

| | Page |
|---|---|
| **Congressional Record** | |
| 35 *Cong. Rec.* p. | |
| 6774 | 6 |
| 62 *Cong. Rec.* p. | |
| 3573 | 59 |
| 5929 | 43 |
| 5985 | 43 |
| 65 *Cong. Rec.* p. | |
| 146 | 43 |
| 217 | 43 |
| 67 *Cong. Rec.* p. | |
| 1232 | 43 |
| 1313 | 43 |
| 4730 | 43 |
| 69 *Cong. Rec.* p. | |
| 97 | 43 |
| 341 | 43 |
| 7626 | 8 |
| 7634-35 | 49-50 |
| 9451 | 50 |
| 10472 | 50 |
| 10495 | 50 |
| 70 *Cong. Rec.* p. | |
| 72 | 52 |
| 289 | 50, 51 |
| 324 | 10 |
| 526 | 52, 53 |
| 528 | 35-36, 53 |
| 576 | 52 |
| 577 | 53 |
| 97 *Cong. Rec.* p. | |
| 4655-59 | 16 |
| 117 *Cong. Rec.* p. | |
| 46228 | 3, 17 |





| | Page |
|---|---|
| **Other Congressional Materials** | |
| *Report of the All-American Canal Board* (*S. Doc. 109,* 66th Cong., 1st Sess.) (1919) Pl. Ex. 59 | 5, 9 |
| *Fall-Davis Report* (*S. Doc. No. 142,* 67th Cong., 1st Sess.) (1922) | 9, 10 |
| *Fact Finders Report* (*S. Doc. No. 92,* 68th Cong., 1st Sess.) (1924) | 7, 50 |
| *Twenty-Third Annual Report of the Bureau of Reclamation* (June 30, 1924) | 7, 8, 20 |
| *Twenty-Eighth Annual Report of the Commissioner of Reclamation* (June 30, 1929) | 8 |
| *Acreage Limitation Policy,* Study for Sen. Comm. on Int. and Insular Affairs, 88th Cong., 1st Sess. (1964) | 8 |
| **Text and Other Materials** | |
| U.S. Dept. of Interior, *Federal Reclamation Laws* (1931) | 12 |
| KING, B.P., EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS (1941) LX-BO | 35, 40 |

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ON WRIT OF CERTIORARI
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## BRIEF OF LANDOWNER PETITIONERS

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### OPINIONS BELOW

The opinion of the Ninth Circuit to which the writ is addressed appears at 559 F.2d 509 (1977), and that court's opinion denying a petition for rehearing appears at 595 F.2d 525 (1979).

The district court's opinion on the merits, which was reversed by the Ninth Circuit, is reported at 322 F.Supp. 11 (S.D. Cal. 1971). After the district court issued its opinion and entered judgment, respondents moved for leave to intervene for purposes of prosecuting an appeal, and the

district court denied the motion by an unreported opinion and order which appear at page 101a of the appendix to the landowners' petition ("Pet. Apx.").*

The order denying intervention was reversed in an unreported decision of a separate panel of the court of appeals. That decision is printed as an appendix to the Ninth Circuit's opinion on the merits, 559 F.2d at 543.

The opinion of the Superior Court of the State of California in *Hewes v. All Persons* is set out at Pet. Apx. 105a.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 18, 1977. A timely petition for rehearing was filed on September 15, 1977, and was denied on April 23, 1979. By order of July 18, 1979 petitioners' time to file a petition for writ of certiorari was extended to September 14, 1979, and the petition was filed on that date. On December 3, 1979, this Court granted the petition for certiorari.

Subject to respondents' lack of standing, this Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617, *et seq.*

Reclamation Act of 1902, §§ 1, 3-5, 8, 10, 32 Stat. 338, 43 U.S.C. §§ 372, 373, 383, 391, 416, 419, 431, 432, 434, 439.

Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 43 U.S.C. § 423e.

Reclamation Extension Act of 1914, 38 Stat. 686, 43 U.S.C. § 418.

Colorado River Compact, 70 *Cong. Rec.* 324 (1928).

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* As noted, "Pet. Apx." refers to the appendix to the landowners' petition in No. 79-421. "Con. Apx." refers to the consolidated appendix to the briefs in Nos. 79-421, 79-425, and 79-435.



California Irrigation District Act of 1897, § 68, 1897 Cal. Stat. 254, 276.

California Irrigation District Act of 1917, § 3, 1917 Cal. Stat. 243, 245.

28 U.S.C. § 1738.

## QUESTIONS PRESENTED

1. Whether the court of appeals committed error by reversing a reasonable administrative interpretation of the Boulder Canyon Project Act which had been consistently followed for nearly 50 years?

2. Whether the court of appeals' denial of full faith and credit to the *in rem* judgment of the California court in *Hewes v. All Persons* contravenes federal law requiring that such credit be given to state judgments, as well as principles of comity and federalism required by this Court's decision in *California v. United States,* 438 U.S. 465 (1978)?

3. Whether respondents lack standing to intervene after judgment and perpetuate an action abandoned by the United States?

## STATEMENT OF THE CASE

**Petitioners.** Petitioners are family farmers whose careers reflect the fact that from 1901 to the present, no acreage limitation has ever been applied to Imperial Irrigation District. Each petitioner has a personal interest in more than 160 acres of irrigable farm land which will be denied water if the judgment of the Ninth Circuit is affirmed. Each lives with his family and farms in the Imperial Valley. Petitioners were permitted to intervene as representatives of the class of persons who, like them, own lands in excess of 160 acres in a single ownership.

**Respondents.** This action was originally filed by the United States. After a full trial, the district court rejected the Government's position; Solicitor General Griswold thereupon determined that the judgment of the trial court was correct and should not be appealed. 117 *Cong. Rec.* 46228.

Respondents then sought leave to intervene for purposes of taking an appeal. Leave was denied by the district court, but this order was reversed by the Ninth Circuit.

Respondents are a group of individuals led by Ben Yellen, a physician from Brawley. They include a farm labor contractor and 121 farm workers. Of this group, ten filed brief affidavits averring an abstract, generalized desire to purchase farm land in the Imperial Valley. II-CR 53-54.[1]

**Proceedings Below.** This action was commenced by the United States on January 11, 1967. The complaint was filed against the Imperial Irrigation District (the "District"), which delivers Colorado River water to 424,000 acres of farms in the Imperial Valley of California. The Government sought a declaratory judgment that the District is subject to provisions in federal reclamation statutes which prohibit delivery of irrigation water to lands in excess of 160 acres in single ownership.

Petitioners were granted leave to intervene as defendants both individually and as class representatives. I-CR 12. The State of California was allowed to intervene as a defendant *parens patriae* and as an owner of land within the District. II-CR 1.

On January 5, 1971, after a full trial, the district court ruled for defendants. Judgment was entered on February 9, 1971. I-CR 125. On March 18, 1971, respondents moved to intervene to prosecute an appeal. II-CR 47.

On March 29, 1971, the trial court denied respondents' motion to intervene (Pet. Apx. 101a), and on April 5, 1971, respondents appealed from the order denying intervention and filed a protective notice of appeal from the judgment on the merits. I-CR 205.

On August 6, 1973, a panel of the Ninth Circuit reversed the trial court's order denying respondents the right to

1. "CR" indicates the clerk's record in the court of appeals. References to "LX-" indicate exhibits introduced by petitioners in the district court. "Pl. Ex." refers to exhibits introduced by the Government at trial.



intervene in this case.[2] Subsequently, a separate panel of the court of appeals heard argument on the merits, and on August 18, 1977, that panel issued its principal decision. Although vacating the judgment in a parallel case on the ground that respondents lacked standing to sue, the panel held that respondents have standing in this case. The panel did not separately consider whether intervention had been improvidently granted by the order of the 1973 panel, nor whether Rule 24 had been satisfied by repsondents' showing in the trial court.

Petitions for rehearing and suggestions for rehearing *en banc* were timely filed by all defendants, but these were denied on April 23, 1979.

## HISTORY OF THE DISPUTE

**Early Irrigation History of Imperial Valley.** Imperial Valley is all of that low-lying desert generally occupying the southeast corner of California. Because the surface area of the Valley is below sea level, irrigation is possible by gravity flow from the Colorado River. In the 1890's, a group of Californians initiated appropriations of water on the river in accordance with state and federal law, and in early 1900, they commenced digging a diversion canal, partly in Mexico and partly in the United States. For much of its length, the canal followed the course of a dry river bed known as the Alamo River; hence the canal came to be known as the Alamo Canal. Water diversions were commenced through the Alamo Canal in July 1901. These irrigation efforts were financed entirely by private funds.

The bringing of water to the Imperial Valley led to unprecedented settlement and development. Within eight months settlers had built 400 miles of main and lateral canals, and by the fall of 1903 there were 5,000 residents in the Valley cultivating 100,000 acres of irrigated land. II-CR 13. In the succeeding decade the settlers organized Imperial County, formed the Imperial Irrigation District, and established ten towns.[3] Virtually the entire area of the

2. For a more extensive description of the procedural history of respondents' intervention, *see* fn. 46 at p. 65, *infra*.

3. *Report of the All-American Canal Board,* Pl. Ex. 59, pp. 11-12. A map of the District as it exists today is attached at the back of this brief. LX-DJ. That map identifies the lands owned by the individual petitioners.

Valley irrigable by gravity flow was converted into family farms by homesteaders.[4] By 1920 there were 43,453 residents in the Valley, and 414,720 acres were under irrigation. II-CR 23.

**The General Reclamation Laws.** On June 17, 1902, Congress passed the National Reclamation Act. 32 Stat. 388 *et seq.* The Act was intended to promote settlement of the arid regions of the West, a goal which its supporters described as the development of "homes out of territory of the United States now practically uninhabited." 35 *Cong. Rec.* 6774. Thus, Congress hoped to enable other areas in the West to achieve, with federal assistance, what was then being accomplished through private effort in Imperial Valley. The 1902 Act contemplated that the Government would appropriate water and develop water distribution systems, and that it would then sell water rights to individual settlers at cost to be repaid in ten annual installments. The Act was conceived to function in tandem with the homestead laws, applying primarily to public lands, but it also provided for the sale of water for arid lands already in private ownership. Section 5 of the Act provided that no water right should be sold for land in excess of 160 acres in private ownership.

From time to time after 1902, additonal legislation was passed to supplement and perfect the mechanics of federal reclamation. In major part, the continuing amendment and supplementation of the general reclamation program was occasioned by financial problems encountered in the operation of early projects. Settlers were commonly unable to meet thier repayment obligations to the Government, and often they lacked sufficient funds to finance the conversion of their sagebrush lands into productive farms.

In 1922, the Secretary of the Interior appointed a group of experts — known as the Fact Finders — to study the

4. These early homesteaders included the parents of petitioners Harold Brockman, Stephen Elmore, Charles Nilson and John Kubler. Brockman still lives on and farms the land his father homesteaded in 1908, Nilson still farms the homestead his father established in 1907, and John Kubler still farms the land his father homesteaded in 1916. 4 Tr. 366-75, 379-90, 398-409.



financial condition of various of the existing reclamation projects. In 1924, the Fact Finders submitted a comprehensive report which indicated that existing legislation had been unsuccessful in checking land speculation, and that land speculation had been a major cause of the unsatisfactory financial experience of many of the existing projects. *Sen. Doc. No. 92,* 68th Cong., 1st Sess. (1924). Owners of large undeveloped tracts sold them to settlers in 160-acre parcels at boom prices which reflected the future availability of water. As a result, the real settlers assumed excessive purchase money debts and ended up unable to meet their repayment obligations to the Government and unable to finance the costs of preparing their raw land for cultivation. The Fact Finders proposed that the Government could better secure repayment of its funds by contracting with irrigation districts, instead of with individual landowners, and that speculation and its adverse financial impact on settlers could be controlled by requiring owners of excess lands within a project to sell those lands to settlers at pre-project prices set by the Secretary.

Following debate on the Fact Finders' proposals in 1924, Congress enacted a bill in 1926 for "adjustment" of the financial deficiencies of existing reclamation projects. Section 46 was inserted into this legislation, adopting the Fact Finders' recommendation that irrigation district contracts be made mandatory on future reclamation projects in the general reclamation program. 44 Stat. 649. Among the detailed contract terms required in a § 46 contract was a provision that owners of lands more than 160 acres be denied water unless they had executed recordable contracts committing them to sell their excess lands at pre-project prices approved by the Secretary.

The Fact Finders and authors of § 46 anticipated that the typical project area would be "*undeveloped territory,* where there is a lack of social advantages, public improvements, roads, schools, churches and amusements, where taxes are high and the neighborhood conditions are unknown."[5] Thus, while it was certainly expected that pri-

5. *Twenty-Third Annual Report of the Bureau of Reclamation,* p. 6 (June 30, 1924). Here and elsewhere emphasis is supplied unless otherwise noted.

vate lands would be included in future general reclamation projects, these were expected to be "unimproved desert land" held by speculators "who did not intend to cultivate it." *Hearings on H.R. 8836,* 68th Cong., 1st Sess. 56, 346 (1924). Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, described the typical excess parcel as "a piece of sagebrush land on which the owners never put one dollar of money or an hour's labor, apart from the original price of $5 per acre" and which, absent divestiture requirements, would be "sold for $200 to the man that is going to clear off the sagebrush." *Id.* at 55. Aimed at these conditions, § 46's overriding purpose was to deny the speculator his $195 profit per acre (*id.* at 55-56), and thereby assure that the settlers who bought the land and cleared off the sagebrush would be on a sound enough financial footing to secure "early conversion of *arid* excess lands from their *preproject dryfarm conditions* to productivity under irrigated agriculture."[6]

**The Boulder Canyon Project Act.** The problems and conditions studied by the Fact Finders and addressed by § 46 were not the problems and conditions prevailing in Imperial Valley in the early 1920's. In the Valley full settlement and development had been achieved, financially successful farming was flourishing and ten towns were prospering. The Valley's farms were incredibly productive, having an annual output that dwarfed that of any of the projects developed under the reclamation program.[7] In Congress, the Valley was described as a "garden spot" and "wonderful piece of territory . . . . as productive as any place in the United States." 69 *Cong. Rec.* 7626. The problem in the

6. *Acreage Limitation Policy,* Study for Sen. Comm. on Int. and Insular Affairs, 88th Cong., 1st Sess., p. 94 (1964).

7. The Valley's farms had an annual crop value of $42,000,000 in 1929. *Hearings on H.R. 5434,* House Comm. on Irr. & Recl., 79th Cong., 2d Sess., p. 286 (1946). By contrast, all of the farms on the 26 federal reclamation projects had an aggregate crop value of only $81,000,000. *Twenty-Eighth Annual Rept. of the Commissioner of Recl.,* p. 63 (June 30, 1929). *See also, Hearings on H.R. 8836,* House Comm. on Irr. and Recl., 68th Cong., 1st Sess., pp. 38, 55, 56 (1924); *Twenty-Third Annual Report of the Bureau of Reclamation,* pp. 1-4 (June 30, 1924).



Valley was not a need to stimulate settlement and development; the problem was a need to protect an already existing and highly successful farm community from the threat of floods and from international difficulties which resulted from use of a diversion canal which was located partly in Mexico.

In 1905, the Colorado had breached its channel and, following the Alamo Canal, had flooded the Imperial Valley. This breach was closed in 1907, but keeping it closed in subsequent seasons required constant expenditure and engineering work, much of this work in Mexico. Another problem was Mexican appropriation of waters flowing in the Alamo Canal. These appropriations created a threat that priorities would arise in Mexico, even though no material part of the Colorado's flow originated in that country. This was a serious threat to future expanded use of the river's waters in the Upper Basin States. These and other difficulties generated hopes that a canal could be constructed entirely within the United States.

In 1919 the Department of The Interior and Imperial Irrigation District contracted to study the possibility of an all-American canal. This study indicated that the investment in any such canal would be continually jeopardized by flood so long as the Colorado remained unregulated. Given the need for a dam to regulate flow, the possibility of storage for the benefit of both Upper Basin states and existing appropriators in the Lower Basin followed naturally. *Report of the All-American Canal Board,* pp. 21-24; Pl. Ex. 59. Congress directed investigation of such a project. 41 Stat. 600. This resulted in publication of the Fall-Davis Report in 1922, recommending that the federal government construct not only an all-American canal, but also a dam and storage reservoir at Boulder Canyon. *S. Doc. No. 142,* 67th Cong., 2d Sess. (1922).

Given the prospect of a national project on the Colorado, the seven states located in the river's basin were granted congressional consent to negotiate a compact for the "equitable division and apportionment . . . of water supply of the Colorado River." 42 Stat. 171. After a year of negotiations, the states were able to reach an agreement, entered November 24, 1922, which provided for an alloca-

tion of the flow of the mainstream as between states in the Upper Basin and those in the Lower Basin. 70 *Cong. Rec.* 324 (1928).

During the last negotiating session of the Compact Commission, representatives of Imperial Valley testified to concern that their existing water rights might be impaired any way by the inter-basin allocation. In response to their request, and recognizing that the farmers in Imperial Valley had been using waters from the river since 1901, the Commission included Article VIII in the Compact,[8] guaranteeing that "present perfected rights" would be unimpaired. Pet. Apx., p. 162a.

Beginning in 1922 and continuing through 1928, Congressman Phil Swing, the Representative from the Imperial Valley, and Senator Hiram Johnson of California offered bills in each session of Congress providing for construction of a dam on the Colorado and of an all-American canal. The last of the Swing-Johnson bills was enacted as the Boulder Canyon Project Act in December 1928. 45 Stat. 1057. In addition to authorizing the engineering measures recommended in the Fall-Davis Report, the statute created a method for "a complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters." *Arizona v. California,* 373 U.S. 546, 560 (1963). That apportionment system includes an explicit mandate in § 6 of the Act for the "satisfaction of present perfected rights in pursuance of Article VIII of . . . [the] Colorado River Compact. . . ." 43 U.S.C. § 617e.

The Boulder Canyon Project Act because of its unique objects and legislative history, is unlike any of the general reclamation statutes that preceded or followed it. Likewise, Imperial Irrigation District in 1928 was not the type of situation for which the prior reclamation laws had been designed. At the time the Project Act took effect, irrigation development and settlement in Imperial Valley was virtually complete. The District then operated a fully-developed distribution system consisting of 1,700 miles of

8. *See, Hearings Pursuant to S. Res. 320,* Sen. Comm. on Irr. and Recl. 69th Cong., 1st Sess. 678 (1925); LX-DD(C).



main and lateral canals (compared with approximately 1,650 miles of canals operated today). II-CR 15. Its farmers were irrigating more than 424,000 acres, some 13,000 less than today (II-CR 23-24), and the population of the Valley was 61,000 people. Congress' purpose was to protect this flourishing farm community, not break it up.[9]

**The All-American Canal Contract.** Subsequent to passage of the Project Act the Department of The Interior entered into negotiations with the District to settle the terms on which the All-American Canal would be constructed and paid for, and water be delivered to the District in satisfaction of its present perfected rights. Early in the negotiations, the question of whether the Project Act made acreage limitation laws applicable to the District was considered, it being recognized that if applicable, § 46 of the 1926 Act would require inclusion in the contract of elaborate acreage limitation provisions. After due consideration, the Department concluded that acreage limitation was not applicable to Imperial Valley under the terms of the Project Act, and from that point forward, beginning in 1930, provisions relating to acreage limitation were intentionally omitted from the draft contract. LX-AR.

Ultimately, on December 1, 1932, the All-American Canal Contract was executed pursuant to §§ 1, 4(b) and 5 of the Project Act. This contract was approved by the District's Board of Directors, and then, as required by state law, the contract was submitted to the voters of the District for approval at a general election. On January 16, 1933, the contract, without acreage limitation provisions, was approved by the District's electors by a margin of 4,947 to 729.

9. "The paramount purpose of this legislation is the protection of human life and property in Imperial Valley . . . [and] other areas in the lower Colorado. . . ." *H. Rep. No. 918,* 70th Cong., 1st Sess. 2 (1928). "In order to protect the properties in the Imperial Valley against possible inundation . . . it is really the duty of the Government to proceed to build the All-American Canal even if no additional lands were contemplated to be put under cultivation." *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. 35 (1926).

***Hewes v. All Persons.*** California's Irrigation District Law, as well as Article 31 of the Contract, required the District to bring an action to confirm the validity of the contract. This action was commenced in the Superior Court for Imperial County under the caption *Hewes v. All Persons*. Charles T. Malan, an owner of 210 acres in the District, contested the validity of the contract on the ground that the reclamation law required imposition of the 160-acre limitation which would unlawfully deprive him of water rights he had been exercising for twenty years. LX-AT, pp. 8-9. Malan was represented by counsel and vigorously prosecuted his claims. LX-AF, BF. The District denied the applicability of the 160-acre limitation law, but conceded that if such law were applicable, the contract would be invalid. LX-BK, p. 19.

On February 24, 1933, in specific response to Malan's allegations in *Hewes,* Ray Lyman Wilbur,[10] Secretary of the Interior, wrote a public letter to the District confirming the Department's intentional omission of any acreage limitation from the contract on the ground that the Boulder Canyon Project Act does not make the land limitation provision of § 5 of the Reclamation Act of 1902 applicable to privately-owned lands in the District. LX-AO, Con. Apx. 176a. Seven days later, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, Porter W. Dent,[11] issued a letter confirming that the Department's interpretation likewise applied to § 46 of the 1926 Act. LX-AR, Con. Apx. 179a. In addition to the issuance of these letters, Dr.

10. Wilbur was President of Stanford University from 1916 to 1943, and Chancellor of the University from 1943 until his death in 1946. He served as Secretary of the Interior from 1929 to 1933, while on leave of absence from Stanford.

11. Porter Dent had directed preparation of the then leading publication on the reclamation laws. United States Department of the Interior, *Federal Reclamation Laws* (1931). Dent was a career government attorney. He had been an Assistant United States Attorney, assigned to the Land Claims Court, and then was a District Counsel for the Bureau of Reclamation. When Dr. Elwood Mead became Commissioner of Reclamation in 1924, Dent was appointed Assistant to the Commissioner. He served in that position until 1927, when he became Assistant Commissioner and Chief Counsel of the Bureau of Reclamation.



Elwood Mead,[12] Commissioner of the Bureau of Reclamation, arranged for government counsel to assist the District in responding to Malan's allegations concerning the 160-acre limitation. LX-AQ.

On July 1, 1933, following the Wilbur ruling, the California court entered judgment in *Hewes* confirming the validity and legality of the contract. LX-BC. The court met Malan's objections by concluding that "§ 5 of the Reclamation Law does not apply" under the terms of the Project Act to lands in the Imperial Irrigation District, and that nothing in the "contract or . . . any law applicable thereto . . . [restricts] the delivery of water to any maximum acreage of land in a single ownership." Pet. Apx. 124a-125a; LX-BC, p. 32.

The Department of the Interior monitored the progress of *Hewes* closely. Under § 4(b) of the Project Act the Secretary was required to make provision for repayment of the cost of the All-American Canal "before any money is appropriated." The Comptroller General in the new Roosevelt administration ruled that this required that the validation judgment on the All-American Canal contract be final before any appropriations could be sought for construction of the canal. LX-BH. Malan prolonged the litigation, first by unsuccessfully seeking a new trial (LX-BF), and then by appealing. In an effort to seek administrative relief, Malan's counsel wrote Secretary Ickes, calling his attention to the reasons for Malan's claim that the contract was illegal, including the acreage limitation issue. LX-BK, p. 1 and attachment at pp. 18-19. Ultimately Malan dismissed his appeal, and the judgment in *Hewes* became final on February 26, 1934. LX-BL. The contract

12. Dr. Mead had been a principal witness before Congress during the hearings on the 1902 Reclamation Act. Prior to becoming Commissioner of the Bureau of Reclamation, he had served as Chief of Irrigation Investigation for the Department of Agriculture and had taught as a professor of rural institutions and irrigation at the University of California at Berkeley. Mead was a member of the All-American Canal Board in 1918-19. He served as Commissioner of Reclamation from 1924 until his death in 1936. Lake Mead, the storage reservoir for Hoover Dam, honors his contribution as one of the principal architects of the Boulder Canyon Project.

was then submitted to Congress and appropriations issued during the succeeding years for construction of the Canal.

**Administrative Practice as to Acreage Limitation.** Construction of the All-American Canal commenced in August 1934. The first deliveries of water through the canal were made in 1940. In 1942, the District ceased using the Alamo Canal, and in 1960 it relinquished its Mexican concession to operate that facility.

In 1941, before closing of the Alamo Canal, the Wilbur ruling was analyzed in a study of the excess land laws conducted within the Bureau of Reclamation. That study concluded that the Project Act did not make acreage limitation applicable in Imperial Valley. LX-BO, App., p. 4. In 1942, the Federal Land Bank asked the Bureau of Reclamation whether loans it was making on farmlands in the District might be jeopardized by possible application of acreage limitations. Commissioner Page responded for the Bureau, advising the Land Bank that it was the opinion of the Bureau, consistent with the 1933 Wilbur ruling and the decision in *Hewes v. All Persons,* that acreage limitations were not applicable to privately owned lands in the District. LX-BR. The General Counsel of the Farm Credit Administration concurred in that opinion. LX-BZ, LX-CA.

In the mid-1940's, a historic congressional debate over acreage limitation policy arose in connection with the Central Valley Project in California.[13] The debate had the effect of polarizing the Government's position on acreage limitation, and no doubt has tended to distort some of the perception of earlier history. Nonetheless, even during these years, the Department adhered to the Wilbur ruling on the Imperial Valley and openly explained it to Congress.

13. The Central Valley is several hundred miles north of the Imperial Valley. The Central Valley Project involved the development of new water sources in the Sierra Mountains, and new distribution systems to irrigate farmlands in California's San Joaquin Valley. *See, Ivanhoe Irr. Dist. v. All Parties,* 47 Cal.2d 597, 614-19, 653-54; 306 P.2d 824, 833-36, 858 (1957).



In 1944, for example, in Senate hearings on acreage limitation, Assistant Reclamation Commissioner Warne explained the Department's interpretation of the Project Act and introduced a copy of the Wilbur letter into the record. *Hearings on H.R. 3961,* Subcomm. of Sen. Comm. on Commerce, 78th Cong., 2d Sess., Part IV, 599, 764-65 (1944); Con. Apx. 229a.

In 1945, Solicitor Fowler Harper of the Department of The Interior issued an opinion concerning inclusion of acreage limitation provisions in a proposed repayment contract for construction by the Bureau of Reclamation of an irrigation distribution system to serve the Coachella Valley. He concluded that the acreage limitation laws should be applied in Coachella. M-33902, 71 I.D. at 533, *et seq.* Harper acknowledged the contrary rule prevailing in the Imperial Valley and did not purport to overrule it.[14]

In 1945 and 1947, congressional debates over acreage limitation policy continued, and during those debates Harper's opinion was not cited as casting any doubt on the validity of the Wilbur ruling. The Bureau compiled an exhaustive survey of landownership in federal projects,

14. The United States had undertaken construction of the Coachella branch of the All-American Canal pursuant to a contract with the Coachella Valley County Water District dated October 15, 1934. That contract did not contain acreage limitation provisions. The contract which was the subject of Harper's opinion was a separate agreement executed in 1947 (Pl. Ex. 10) and unlike the Imperial Irrigation District contract, its purpose was to provide for construction of an irrigation distribution system for Coachella. Pl. Ex. 12. The farmers in the Coachella Valley had no pre-existing rights to water from the Colorado River. As was noted by Commissioner Bashore,

> ". . . the lands in the Coachella District are, in very large part, as yet not irrigated, and . . . those which have been irrigated have not been irrigated by the diversion and delivery of waters from the Colorado River. The proposed works will not only be a new means of getting water to the Coachella lands, but will also bring to those lands a new water supply. The factual situation of the Coachella lands seems to take them out from under the ruling of Secretary Wilbur." Pl. Ex. 13, p. 3.

which was issued to congressional committees involved in the acreage limitation debates,[15] and that study noted that the 257,949 acres held in excess of 160-acre ownerships in Imperial Valley were not "excess" since the acreage limitation laws were inapplicable in the Valley "in accordance with the ruling by the Secretary, February 24, 1933". LX-CT, pp. 17 n.6, 19 n.6. Secretary Wilbur's ruling and the inapplicability of acreage limitations in Imperial Valley were discussed in the hearings, and no objection was voiced as to the Department's position. *Hearings on S. 912,* Before a Subcomm. of the Sen. Comm. on Public Lands, 80th Cong.. 1st Sess. 159-160, 162, 166, 179, 431-32 (1947).

In 1948, the Department was requested by a veterans organization to reconsider the Wilbur ruling. Acting with the concurrence of Solicitor White (LX-BU), Secretary Krug issued a letter affirming the Department's adherence to the Wilbur ruling. LX-CR; Con. Apx. 253a. In 1949, congressional hearings on acreage limitation policy continued, and again, the practice in Imperial Valley was noted without disapproval. *Hearings on S. 1385,* 81st Cong., 1st Sess., pp. 12, 15, 50-51 (1949).

From 1947 to 1952, the Government sought changes in the All-American Canal Contract, and these were the subject of extensive negotiations between the Department and the District, which were scrutinized by Congress. During these negotiations and congressional proceedings, the Department never questioned the validity of the contract's omission of acreage limitation provisions.[16]

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15. *E.g., Hearings on Irr. and Recl.,* Before a Subcomm. of the House Comm. on Public Lands, 80th Cong., 1st Sess. 11 (1947).

16. Members of Congress were critical of the Bureau's attempt during these years to vary the terms of the All-American Canal Contract without the District's consent. *See, Hearings on H.R. 6705,* 80th Cong. 2d Sess., Part III, pp. 1775-76, 1595-1600, 1613 (1949); *Hearings on H.R. 3790,* 82nd Cong., 1st Sess., Part I, pp. 434-44, 1283-1338 (1951); 97 *Cong. Rec.* 4655-59 (1951); *Hearings on H.R. 7176,* 82nd Cong. 2d Sess., Part IV, 1652-1687 (1952). Those in the Department who then harbored doubts regarding the Wilbur ruling consciously decided not to *(Footnote continued on next page.)*



In 1958, Solicitor Bennett reaffirmed the Department's adherence to the Wilbur ruling (LX-CS), and in that same year the Wilbur letter was again discussed, without criticism, in Senate hearings on acreage limitation policy. *Hearings on S. 1425, S. 2541 and S. 3448,* 85th Cong., 2d Sess. 19, 85, App.C. at 7 and 11 (1958).

On December 31, 1964, Solicitor Frank Barry unexpectedly issued an opinion criticizing the Wilbur ruling and concluding that acreage limitation laws should have been applied to Imperial Valley in 1932. 71 I.D. 496. Notwithstanding criticism of that opinion within the Department,[17] the Department pressed for the District's concurrence with imposition of acreage limitations. The District advised that under *Hewes v. All Persons* it was precluded by law from complying with the Government's demand. Pl. Ex. 46, p. 2. Accordingly, the Government commenced this action in 1967 and vigorously prosecuted it through trial. After the district court's decision rejecting the applicability of acreage limitations, the Department of the Interior recommended against an Appeal. 117 *Cong. Rec.* 46228. Solicitor General Griswold then reviewed the case and decided that the Government should not appeal. In explanation of his decision, he stated that he had "considered the matter carefully and thoroughly . . . over a considerable period of time" and "became convinced that (a) we would not win the case in the court of appeals and (b) we should not win it." *Id.*

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raise the acreage limitation issue during negotiation of the 1952 contract amendments. As testified by the Government's chief witness at trial, former Solicitor Edward Weinberg, these individuals felt it would be "counterproductive" to propose reconsideration of acreage limitation at that time because the District "would never have signed the contract." 3 Tr. 255. *See also, id.* at 220.

17. Undersecretary Carver challenged the "legal sufficiency" of the Barry Opinion, characterized it as being "long on protestations of certitude" like a "partisan brief," and concluded that it would unjustifiably result in "almost complete disruption of a region's economy and literal confiscation of the margin of values between present units and the uneconomical pattern that would result." LX-CQ.

**The People Affected by the Decision Below.** Petitioners represent the people whose lives are threatened with harsh dislocation and devastating economic loss by the decision below. Each lives in the Valley and owns farmland on which he has invested the better part of his life's labor and the bulk of his life's savings. Typically, they have acquired their lands over a period of one or two decades, paying market prices which reflected whatever economic value accrued to the land from project benefits. Petitioner Robert C. Brown's situation is representative.[18] Brown

18. The following is a thumb nail summary of the trial testimony relating to the other individual petitioners:

*John M. Bryant.* Bryant is a rancher owning 1,120 acres near Calipatria. He came to the Valley from Northern California in 1928 and worked for a produce company through most of the depression. He began farming part-time in 1932 and purchased his first 80 acres of land in 1938. He has been a full-time farmer since 1942. He gradually accumulated the balance of his farmlands over the period 1942-1959, paying prevailing market prices. Like all petitioners and all Imperial Valley farmers, he has had to make substantial, and reoccurring, investments to keep his land productive under the high-salinity conditions prevailing in Imperial Valley. Bryant was a director of Imperial Irrigation District from 1949 through 1961. During that time, including when the All-American Canal contract was renegotiated, no suggestion was ever made to the District by any official of the federal government that acreage limitation might be applicable to Imperial Valley. 4 Tr. 415-424.

*Harold Brockman.* Brockman farms 1,080 acres in the Mount Signal area, which are jointly owned by him and his wife. Brockman's father homesteaded in the Valley in 1908, and was a director of the Imperial Irrigation District when the All-American Canal Contract was executed. Mr. Brockman still lives in the house in which he was born, and has continued to farm the land his father homesteaded. Brockman began farming in 1924 and in 1933 he was granted 160 acres by his father. The balance of the land owned by him and his wife was gradually acquired during the period 1938-1957. 4 Tr. 398-409.

*Stephen Elmore.* Steve Elmore and his wife jointly own 2,208 acres which they farm. Elmore grew up in the Valley, the son of a homesteader who began farming in the Valley in 1908. The lands owned by Elmore and his wife were acquired by them during the period 1951-1964. 4 Tr. 354-65.

*Clara Marie Gutierrez.* Mrs. Gutierrez owns and lives on a 515 acre farm in the Westmoreland area. She was born in the

*(Footnote continued on next page.)*



came to the Valley in 1942, and until 1949 worked as an employee of a sugar plant, while farming on a part-time basis. In 1949 he began farming on a full-time basis on leased lands. By 1956, he had saved enough to purchase his first 80 acre parcel. The balance of his 880-acre farm was acquired during the years 1961 and 1962. Brown bought at market prices existing 30 years after the enactment of the Project Act, and he had to incur a huge mortgage indebtedness to finance the $589,000 he paid for the land. Then he had to invest an additional $90,000 in reclamation measures,

Valley and has lived there throughout her life. She and her husband, a Basque shepherd who came to the Valley in 1928, acquired their first parcel of farm land in 1938, a spread of 80 acres on which Mrs. Gutierrez still lives. The balance of her acreage was gradually accumulated by her and her husband in small parcels they purchased in the 1940's and 1950's. 4 Tr. 390-397.

*Charles Nilson.* Nilson farms in the vicinity of Holtville with his brothers, Carol and Walter. The land they farm includes the 140-acre parcel which their father homesteaded in 1907 and on which the brothers grew up. Their father still owns and lives on that homestead. Of the lands farmed by the Nilson brothers, Charles and his wife own approximately 615 acres. The Nilson brothers first acquired land in their own right in 1946, purchasing 170 acres of salt-poisoned land for which they paid $15 an acre. For five years they worked to reclaim that land, plowing it to a depth of four feet to bring up fertile soil. The other lands farmed by the Nilsons were gradually acquired by them during the period 1947 to 1961. 4 Tr. 379-390.

*John Kubler.* Kubler, also a life-long resident of the Valley, is the son of a Swiss immigrant who moved to Imperial Valley in 1916. John began farming in the Valley in 1950, and now farms in the vicinity of Calexico on 680 acres owned by him and his wife. He inherited 130 acres from his father in 1959, and acquired the balance of his holdings over the period 1960-1967. 4 Tr. 366-75.

*Kakoo Singh.* Mr. Singh, who died subsequent to the trial, is survived by his wife, who is now the sole owner of their 696 acre farm in the Valley. Mr. Singh began farming in the Valley in 1914, but because of the Alien Land Laws then in effect, he and Mrs. Singh were not able to acquire their first land until 1941. They accumulated their acreage in small parcels during the period 1941-1958. LX-DK.

*T. B. Shank.* Mr. Shank homesteaded in the Valley in 1904, and lived on his homestead and farmed it until his death, following the trial. 3 Tr. 279-291.

$20,000 for building structures, and $175,000 for equipment, none of which is suitable for or economically feasible for use on a 160-acre farm. 4 Tr. 349-350. Like the other petitioners, Brown would be economically destroyed if he were denied water for his land and forced to sell it at an appraised price reflecting only what its value would be without water. His past life's work, his plans for the future, including retirement and his estate plans, are all threatened with harsh destruction by the decision below.

The irony of the decision below is that the human toll it threatens would be the very opposite of what § 46 of the 1926 Act was designed to achieve. The authors of § 46 envisioned that it would lead to the growth of communities in "undeveloped territory,"[19] not disruption of farm communities three-quarters of a century old. They envisioned that § 46 would force divestiture of "sagebrush land on which the owners had never put one dollar of money or one hour's labor,"[20] not force breakup of farms gradually acquired as the reward of a lifetime of active farming. The authors of § 46 envisioned sales of idle sagebrush land acquired by speculators at prices like $5 per acre;[21] they did not contemplate forced divestiture of cultivated lands owned by bona fide farmers, at appraised prices far below the investment costs of the farmer-owners. If the Project caused land speculation in Imperial Valley in the 1930's and 40's, (and there is no evidence it did), the present owners were the *victims* of that speculation, not the beneficiaries. Above all, the authors of § 46 sought to protect the farmer who "clears off the sagebrush" and "changes the raw land into a farm,"[22] not to penalize the farmer who had spent his life making the land productive.

No one has ever been able to explain how such a perversion of the vision the Congress had in the 1920's could serve the public interest, much less comport with elemental notions of fairness and decency.

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19. *Twenty-Third Annual Report of the Bureau of Reclamation,* p. 6, June 30, 1924.

20. *Hearings on H.R. 8836,* 68th Cong., 1st Sess. 55 (1924).

21. *Id.* at 55-56.

22. *Id.* at 55, 59.



## SUMMARY OF ARGUMENT

**1. Statutory Construction.** Section 6 of the Project Act explicitly commands the Secretary, without qualification, to satisfy present perfected rights. As emphasized by this Court in *Arizona v. California,* 373 U.S. 546, 584 (1963), Section 6 is "one of the most significant limitations" on the Secretary's power to contract for water deliveries, and is found in the Project Act because it was "a matter of intense importance to those who had reduced their water rights to actual beneficial usage at the time the Act became effective." The congressional directive to satisfy the present perfected rights in Imperial Valley, rights measured by the amount of water needed to irrigate 424,145 acres of farmland, is plainly inconsistent with implication of a congressional intention to apply acreage limitation. Such limitation would require denial of water to 233,000 of those acres. Moreover, other specific provisions of the Project Act negate any inference of intent to apply acreage limitation. These include § 1, which prohibits charging for water delivered to Imperial Valley, § 4(b) which prescribes repayment procedures inconsistent with § 46's scheme, and § 9 which provides for acreage limitation on public lands (but not on private lands).

The legislative history of the Project Act conclusively establishes that Congress did not intend acreage limitation. Congressman Swing, the Act's author, testified that the statute would not impose acreage limitation. Commissioner Mead, testified to the same effect, and the principal opponents of the legislation constantly objected that it would not impose acreage limitation Amendments proposing inclusion of statutory language to require acreage limitation were proposed in Senate Committee and during the Senate floor debates, but were never adopted. The Senate bill which became the final Act conspicuously omitted an express acreage limitation provision that had been inserted in a parallel House bill. Opponents objected to this omission, but Congress enacted the statute with the acreage limitation provision being omitted.

Were this a case of first impression, the foregoing evidence in the language of the Act and its legislative history

would compel a conclusion that Congress did not intend imposition of acreage limitation in the Valley. But whatever conclusion might be reached if this issue were being considered in 1933, the record clearly demonstrates that there is more than sufficient basis for reasoned argument and construction in support of the longstanding practice which was initiated in 1933 by those who had a contemporaneous perspective of what Congress intended. In such circumstances, and particularly where private citizens have relied on the Government's longstanding construction, it would be fundamentally unfair, injudicious and violative of this Court's decisions to construe the statute contrary to its historical interpretation.

2. **Federal Respect for State Law and State Court Judgments.** Under California law, and in other western states as well, the validity of irrigation district contracts is conditioned on three fundamental requirements: (1) approval of any proposed contract by the district's elected board of directors, (2) electoral approval of any proposed contract by a majority of the district's voters, and (3) judicial confirmation, in *in rem* proceedings, of the validity of the contract. Congress has explicitly approved and directed federal compliance with these state law procedures for irrigation district contracts. The parties to the All-American Canal Contract intentionally excluded any provision for acreage limitation, and the District's board and its electors approved that contract, not a contract with acreage limitation provisions. By setting aside what the parties to the All-American Canal Contract intended, the lower court's decision would negate the state law requirement for board and electoral approval of the District's contract obligations. Such disregard of state law denies the comity continually expressed as a requirement of federal reclamation practice. *California v. United States,* 438 U.S. 645 (1978).

The nullification of state law implicit in the lower court's decision is aggravated by the fact that it resulted from an unjustified refusal to accord *res judicata* effect to the judgment in *Hewes v. All Persons.* Both state and federal law require that confirmation judgments, such as that reached in *Hewes,* should foreclose any belated private inquiry



concerning matters legitimately within the scope of the issues adjudicated. That acreage limitation questions are within the scope of issues properly adjudicated in confirmation proceedings is established beyond question. This Court's determination of acreage limitation questions in *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958), was rendered in a confirmation proceeding brought under the identical jurisdictional statutes as *Hewes v. All Persons.* Thus, the lower court's disregard of *Hewes* violates not only the principles of federalism expounded in *California v. United States, supra,* but also the obligation, imposed upon the federal judiciary by § 1738 of the Judicial Code, to accord full faith and credit to state court judgments.

3. **Respondents' Lack of Standing.** Respondents are post-judgment intervenors who made no showing of an interest sufficient to warrant intervention under Rule 24, and who lack standing under Article III. Their alleged standing is predicated on an abstract, conclusionary assertion of a desire to purchase farmland in the Imperial Irrigation District. No showing has ever been made that if a judgment is entered in their favor, they will actually be able to purchase land. The court below did not find such ability; it simply held that it was enough that its judgment would reduce land values in Imperial Valley to some extent, regardless of whether any benefit would flow to respondents from that fact. Article III, as interpreted by this Court in *Warth v. Seldin,* 422 U.S. 490 (1975), does not permit an action to be prosecuted on such a basis. To have standing, respondents were required to show that a judgment in their favor would result in a realistic probability that they would purchase land in the Valley. They did not make this showing.

## ARGUMENT

### I. INTRODUCTION: THE DECISION BELOW IS WRONG IN THE FUNDAMENTAL SENSE THAT IT IS UNFAIR TO THE PEOPLE OF IMPERIAL VALLEY WHO RELIED ON THE WORD OF THE GOVERNMENT.

The arguments that take up the remainder of this brief are traditional in form and content. They deal with the interpretation of the language of the Boulder Canyon Project Act and the legislative history evidencing Congress' understanding of those provisions. They deal with the importance of the administrative construction consistently followed for 30 years prior to this action, and they deal with principles of *res judicata* and standing. Although the arguments are different, the principal basis of each of them is the same: they represent doctrines designed to insure that the law is *fair*. The decision below is erroneous because it is blatantly unfair.

The heart of this case is not a series of legal arguments — petitioners' or anyone else's. It is the indisputable fact that fifty years ago the Government interpreted the Boulder Canyon Project Act to entitle Imperial Valley farms to enjoyment of their water rights free of acreage limitation. For 50 years, ordinary people in Imperial Valley, farmers not legal scholars, relied on the Government's conduct without suspecting that one day lawyers' quibbles could overturn the premise on which their lives and their livelihoods had been built up over the years. *People* planned their careers, expended their lives' labor and invested their savings on the basis of the status quo — a status quo defined in a contract with the Government, approved in a special election, confirmed by an *in rem* judicial decree, and recognized in practice throughout the administrations of six succeeding Secretaries of the Interior and five Presidents.

The equitable claims of the farmers of the Imperial Valley have been recognized even by one of their adversaries. In contrast with the position the Government has taken in the courts, recent testimony before Congress by Secretary



Andrus acknowledged the relevance of the administrative practice:

> "I think we have to recognize that the Imperial Valley — I will use the term 'unique'. . . . It is true . . . that in early calendar year 1933 there was a letter signed by one of my predecessors which determined that the acreage limitation would not apply to Imperial Valley.
>
> ". . . .
>
> ". . . [T]he people out there have looked upon that as an assurance from the federal government . . . *whether I agree with what some of my predecessors did or not is not the important thing.*
>
> *"They did do it, and we have a certain area of responsibility in that regard. . . ."*[23]

No hint of a similar concern for fairness appears in the Ninth Circuit's opinion in this case. Yet, fairness is the central purpose of the controlling principles of statutory construction applicable to this case. As this Court has held repeatedly, fairness requires adherence to the established administrative construction, especially where citizens have innocently relied on it:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. '. . . [W]e need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n v. Aragon,* 329 U.S. 143, 153. *See also, e.g., Gray v. Powell,* 314 U.S. 402; *Universal Battery Co. v. United States,* 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its

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23. *Acreage Limitations on Bureau of Reclamation Projects,* Hearings on S. 242, S. 1812, S. 310, S. 2606 and S. 2818 before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., p. 551 (1978).

machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' *Power Reactor Co. v. Electricians,* 367 U.S. 396, 408. . . ." *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

Under the rules of statutory interpretation defined in *Tallman* and in countless other decisions,[24] the duty of the courts is to uphold the validity of a longstanding administrative practice, even as against sensible criticism, if there is any reasonable support for it. This standard is not necessarily dependent, as such, on whether all of the grounds supporting the original administrative practice were valid in the abstract or whether a court would agree with them today. On the contrary, it is the reliance of ordinary people on the practice of the Government that makes it important to indulge every reasonable presumption in favor of the status quo. As stated in *United States v. Midwest Oil Co.,* 236 U.S. 459, 474-43 (1915):

"It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department — on the presumption that un-

24. *E.g., Zenith Radio Corp. v. United States,* 437 U.S. 423 (1978); *Saxbe v. Bustos,* 419 U.S. 65 (1974); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 381 (1969); *FHA v. Darlington, Inc.,* 358 U.S. 84, 90 (1958); *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 739-40 (1950); *Norwegian Nitrogen Co. v. United States,* 288 U.S. 294 (1933); *United States v. Jackson,* 280 U.S. 183, 193, 196-197 (1930); *United States v. Minnesota,* 270 U.S. 181, 205 (1926); *Swendig v. Washington Water Power Co.,* 265 U.S. 322, 331 (1924); *Kern River Co. v. United States,* 257 U.S. 147, 154 (1921); *McLaren v. Fleischer,* 256 U.S. 477, 480-81 (1921); *LaRogue v. United States,* 239 U.S. 62, 64 (1915); *United States v. Midwest Oil Co.,* 236 U.S. 459, 472-73 (1915); *Logan v. Davis,* 233 U.S. 613, 627 (1914); *Kindred v. Union Pacific R. R.,* 225 U.S. 582, 596 (1912); *United States v. Hammers,* 221 U.S. 220, 228-29 (1911); *Hewitt v. Schultz,* 180 U.S. 139, 156 (1901); *Hawley v. Diller,* 178 U.S. 476, 488 (1900); *Hastings & Dakota R. Co. v. Whitney,* 132 U.S. 357, 366 (1889); *United States v. Burlington & Mo. River R. Co.,* 98 U.S. 334, 341-42 (1878).



authorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but *the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself* — even when the validity of the practice is the subject of investigation."

There is no need to belabor the controlling principle of statutory interpretation further. It is one which this Court has followed from its earliest days, and the Ninth Circuit's failure or refusal to follow it is manifest. Moreover, in this case the principle of *Tallman* is not invoked to uphold a doubtful but traditional construction of the statute as against a more logical one. Here, the *Tallman* rule simply makes it more plain that the most obvious and probable interpretation of the Boulder Canyon Project Act, the one Secretary Wilbur adopted, *must* be upheld as against criticism conceived long after the event by lawyers in no position to share the frame of mind of the 70th Congress.

## II. THE TERMS OF THE BOULDER CANYON PROJECT ACT SHOW THAT THE 1928 CONGRESS DID NOT INTEND TO IMPOSE ACREAGE LIMITATION IN IMPERIAL VALLEY.

As discussed in *Arizona v. California,* 373 U.S. 546, 551-52 (1963), the background and scope of the Boulder Canyon Project Act make it unique and distinguish it from any other reclamation statute. Its primary purposes were, first, to implement the expectations of all the Colorado River Basin States that the natural flow of the Colorado would be regulated and conserved by the construction of a massive dam. Achievement of that purpose would assure availability of water for use in the Upper Basin States with an adequate supply still being assured for vested or future uses in the states of the Lower Basin. This purpose is accomplished by §§ 1, 4(b) and 8 of the Project Act. Section 1 provides for the construction of the dam. 43 U.S.C. § 617. Section 4(b) provides for its financing (43 U.S.C. § 617c), and § 8 provides that the Secretary shall observe the inter-

Basin water allocation established by the Colorado River Compact in the operation of the dam. 43 U.S.C. § 617g.

A second, closely related purpose was congressional endorsement of the Colorado River Compact which is accomplished by § 13. 43 U.S.C. § 617*l*.

The third and most innovative purpose of the Act was to create a "comprehensive scheme for apportionment among California, Arizona and Nevada of the Lower Basin's share of the mainstream waters of the Colorado." 373 U.S. at 565. "Congress did this by giving the Secretary power to make contracts for delivery of water and by providing that no person could have water without a contract." *Id.* These essential contracting provisions are spelled out plainly in § 5, in which the power to contract for water delivery is granted, and in § 6, in which that power is "significantly limited," most importantly by the Secretary's express obligation to satisfy present perfected rights in the Lower Basin. 43 U.S.C. §§ 617d, 617e.

A number of provisions of the Project Act refer directly to Imperial Valley. This is because, as the Court observed in *Arizona v. California*, the initial focus on the need for a Basin-wide project grew out of events in Imperial Valley. Thus, § 1 authorizes construction of the All-American Canal to the Imperial and Coachella Valleys, and specifies that no charge should be made by the Government for use of irrigation water delivered to these areas. Section 6, in its all-important guarantee of present perfected rights, was understood to deal pre-eminently with Imperial Valley. Section 4(b) is also keyed to Imperial Valley for it contains unique and independent provisions designed to assure that the cost of constructing, maintaining and operating the All-American Canal would not be reimbursed out of power revenues, but rather, would be repaid by the Imperial Valley farmers in accordance with the financing conventions of reclamation law. 43 U.S.C. § 617c.

Section 9 is the only provision in the Act dealing with acreage limitation. It provides that entries on any *public lands* susceptible of irrigation by the works authorized in the Act should be limited to tracts "not exceeding one hundred and sixty acres." 43 U.S.C. § 617h.



Finally, §§ 14 and 18 are relevant here. Section 14 provides that the "Act shall be deemed a supplement to the reclamation law" and that the reclamation law "shall govern the construction, operation and management of the works . . . *except as otherwise herein provided.*" 43 U.S.C. § 617m. Section 18 states that nothing in the Project Act should be construed as "interfering with such rights as the States now have . . . to adopt policies and enact such laws as they may deem necessary with respect to appropriation, control and use of waters within their borders. . . ." 43 U.S.C. § 617q.

It is from a synthesis and reconciliation of all these provisions of the Project Act taken together, and then in light of the legislative history, that the 1928 Congress' intention with respect to acreage limitation must be ascertained. As shown below, the terms of the statute and its legislative history leave no room for doubt on that score. They confirm that Secretary Wilbur was correct when he concluded in 1933 that Congress did not intend to impose acreage limitation in Imperial Valley.

### A. The Congressional Mandate in § 6 for Satisfaction of Present Perfected Rights, Which Was Intended Specifically to Protect the Existing Water Uses in Imperial Valley, Negates Any Intention to Impose Acreage Limitation.

In § 6 of the Project Act, Congress directed the Secretary, without qualification or condition, to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." 43 U.S.C. § 617e. Section 6 is one of the most important provisions of the Act. As this Court stated in *Arizona v. California*:

> "One of the most significant limitations in the Act is that the Secretary is required to *satisfy* present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6." 373 U.S. at 584.

When it made satisfaction of present perfected rights a mandatory part of its plan for the Colorado River, Con-

gress clearly had the farmers of Imperial Valley in mind. Article VIII of the Compact, the first expression of the concept of present perfected rights, had originated in response to a demand by Imperial Valley water users for protection. As Delph Carpenter, one of the drafters of the Compact, explained to Congress:

> "During the deliberations of the Colorado River Commission in Santa Fe, and after 10 days' work, a sketch or outline of the progress was released to the press, stating what had happened and the proposed terms of a treaty. . . . The Imperial Valley representatives were immediately responsive. They came before the Commission and presented their claims with great vigor. . . .
>
> "In view of that claim, coming as it did from people who cultivated upward of half a million acres of very valuable land, Article VIII of the Compact was drawn at the last session of the proceedings." *Hearings Pursuant to S. Res. 320,* Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess. at p. 678 (1925); LX-DD(C).

Consistent with the origin of the term, when "present perfected rights" was used in the congressional proceedings leading to the Project Act, it was typically defined by reference to the rights of landowners in Imperial Valley. For example, when Congressman Raker asked about the meaning of Article VIII during the House hearings, Commissioner Davis of New Mexico answered:

> "It first recognizes the fact, to speak of the existing situation, that the compact shall not affect the actual appropriations — *valid appropriations — in the Imperial Valley* or anywhere else on the River. Then it says that after storage capacity . . . has been created . . . the rights of those appropriated down below will be satisfied out of the storage instead of out of direct flow." *Hearings on H.R. 2903,* House Comm. on Irr. & Recl., 68th Cong., 1st Sess. 1769 (1924); LX-DD(B).

In the words of Congressman Hudspeth, the Project Act's § 6 mandate for satisfaction of present perfected rights



was specifically intended to apply to "the lands in Imperial Valley." *Hearings on H.R. 6251 and H.R. 9826,* House Comm. on Irr. & Recl., 69th Cong., 1st Sess. 167 (1926); LX-DD(D).

In *Arizona v. California,* this Court defined a "perfected right" as a water right "acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land. . . ." 376 U.S. at 341. A "perfected right" is "present" for purposes of the Act if it existed as of December 21, 1928, the effective date of the Project Act. Since 424,145 acres of privately-owned land were under irrigation in the Imperial Irrigation District as of that date, this Court has set the measure of Imperial's perfected rights at 2.6 million acre feet per year, or the quantity of water necessary to irrigate 424,145 acres, whichever is less, with a priority date of 1901. *Arizona v. California,* 439 U.S. 419, 429 (1979).

If acreage limitation were to be applied in the Valley in accordance with the lower court's decision, the Secretary would be under a duty to cut off water for 233,000[25] of the 424,145 acres which account for and are the source of the District's present perfected rights. No exercise in logic can reconcile the Secretary's § 6 duty to deliver water in full satisfaction of the present perfected rights held for the Valley's 424,145 acres with a theory that the Project Act also commands the Secretary to cut off delivery of such water to more than half the acres having beneficial entitlement to it. As the district court held, the "duty of the Secretary [under § 6] to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water and the exercise of these rights." 322 F.Supp. at 18; Pet. Apx. 83a.

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25. It was stipulated at trial that "as of September 3, 1965, private landowners in the District held approximately 233,000 acres of irrigable lands which were in excess of 160 acres per single owner." II-CR 18.

The court of appeals strained to attempt to reconcile § 6 with its assumption that Congress intended acreage limitation. It did this by constructing an argument, neither briefed nor argued, based upon an erroneous interpretation of California irrigation district law that *legal title* to irrigation water is held by the District in trust for its constituent landowners. The court hypothesized that the Secretary's § 6 duty could be construed as owing only to the District, as holder of the legal title to the Valley's present perfected rights; and, that once water is formally delivered to the District, the Secretary could compel the District to withhold distribution of that water to 233,000 acres of its constituent farm land without in any way violating his § 6 duty.[26]

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26. California's law on the division of ownership rights in appropriated water is complex and may be unique in the western states. While it is literally correct that "no particular landowner or particular piece of land is entitled to any particular portion of the water to which the irrigation district owns rights" (559 F.2d at 528-29), acreage limitation has been permitted for California irrigation districts only where the water right belongs to the federal government, not the district. *See Ivanhoe Irr. Dist. v. All Parties,* 53 Cal. 2d 692, 704; 350 P. 2d 69, 75; 3 Cal. Rptr. 317 (1960). Where the district itself has unqualified title to the water right, there is a long line of California cases which establish that individual owners within such a district can indeed compel the district (like any other public service water company) to continue service to their particular lands without discrimination based on size of ownership. *San Bernardino Mun. Water Dist. v. Meeks & Daley Water Co.,* 226 Cal. App. 2d 216, 222-23; 38 Cal. Rptr. 51, 54-55 (1964); *Erwin v. Gage Canal Co.,* 226 Cal. App. 2d 189, 194-95; 37 Cal. Rptr. 901, 904 (1964); *Henderson v. Oroville-Wyandotte Irr. Dist.,* 207 Cal. 215, 220; 277 Pac. 487, 489 (1929); *Bent v. Second Extension Water Co.,* 51 Cal. App. 648, 650; 197 Pac. 657, 658 (1921); *Riverside Land Co. v. Jarvis,* 174 Cal. 316, 321-25; 163 Pac. 54, 57-58 (1917); *Leavitt v. Lassen Irr. Co.* 157 Cal. 82, 92-93; 106 Pac. 404, 408 (1909), *Orcutt v. Pasadena Land & Water Co.,* 152 Cal. 599, 600; 93 Pac. 497, 497-98 (1908); *South Pasadena v. Pasadena Land & Water Co.,* 152 Cal. 579, 587-88; 93 Pac. 490, 494 (1908), *San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County,* 191 Fed. 875, 895 (C.C.N.D. Cal. 1911). Contrary to the Ninth Circuit, such owners can block addition of new acreage

*(Footnote continued on next page.)*



The lower court's reading of § 6 is impossible to support in the historic context of the Compact and the Project Act. The protection of "present perfected rights" was inserted in the Compact at the instigation of Imperial Valley farmers concerned with *their* lands. The guarantee was drafted to protect these people. With knowledge of that background, Congress mandated that the rights of those people be *satisfied.* 373 U.S. at 566-67. Throughout the congressional proceedings, "present perfected rights" were described with reference to the farmers in the Valley who were then using the water. The guarantee of § 6, as this Court emphasized in *Arizona v. California,* was a matter of "intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." *Id.* at 584. The "intense" concern this Court referred to was plainly the concern of users for their existing livelihood, not a theoretical concern for a "total quantity of water" that would be unuseable without a restructuring of Imperial Valley's then twenty-year old economy. To accept the court of appeals' theory, it is necessary to assume that the draftsmen of the Compact and the congressmen who extended the Compact's guarantee in § 6 of the Project Act were playing word games with the people of the Imperial Valley. That assumption does no credit to them, or to the court that hypothesized it.

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to the service area of the district if that addition would deplete their established level of water service. *Fellows v. City of Los Angeles,* 151 Cal. 52, 63; 90 Pac. 137, 141 (1907); *Butte County Water Ass'n v. Railroad Comm'n,* 185 Cal. 218, 235-38; 196 Pac. 265, 273 (1921) [concurring opinion]; *Byington v. Sacramento Valley West Side Canal Co.,* 170 Cal. 124, 130; 148 Pac. 791, 793 (1915) [*dictum*]. Clearly a state-initiated curtailment of established water service would, at a minimum, entitle the landowner to compensation under the law of eminent domain. *San Bernardino Mut. Water Dist. v. Meeks & Daley Water Co., supra,* 226 Cal. App. 2d at 223, 38 Cal. Rptr. 51, 54-55.

Thus, it is incorrect that the District's ownership of *legal title* to the present perfected right means that its landowners do not have an enforceable right under California law to compel the District to continue water service to their individual lands.

### B. Section 1 of the Project Act Indicates a Congressional Understanding that Acreage Limitation Was Not Applicable to Imperial Valley.

Section 1 of the Project Act provides in part that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella valleys." 43 U.S.C. § 617. Secretary Wilbur correctly pointed to this provision as reflecting a congressional awareness that users in Imperial Valley had vested appropriative rights to water for their lands, and as indicating a congressional intention not to disturb those rights. LX-AO; Con. Apx. 177a.[27]

To understand the strength of Wilbur's reasoning, it is important to bear in mind that in 1933, he had a much fresher understanding of the contemporary attitude about federal reclamation policy and its basis than we can deduce today. The 160-acre limitation had its origin in § 5 of the Reclamation Act of 1902. That section provided for the *sale* of water rights to individual farmers, and acreage limitation was made a restriction upon the Government's willingness to sell. Today the sale mechanics of § 5 are a thing of the past, but in 1928, as Secretary Wilbur recognized, the 1902 system was likely to have been much more prominent in congressional thinking. Up to that time, the sale of at least a supplemental water right had been the customary basis for imposition of an acreage limitation. This was considered to be so fundamental that the Bureau of Reclamation had construed even the general reclamation law to permit delivery of water to owners of farms on federal projects which were in excess of 160 acres where such deliveries merely satisfied pre-project vested rights, without more.[28] Because contemporary thinking equated acreage

27. No similar water right existed in the Coachella Valley, but at the time, all concerned anticipated that Coachella would be annexed to the Imperial Irrigation District. The inclusion of Coachella in the § 1 proviso no doubt represented a legislative judgment that it was not advisable to charge for some of the water used within the single district, while not charging for water delivered to supply existing rights. It is plain from the legislative history, in any case, that the § 1 proviso was indeed one of several manifestations of the intention of the 70th Congress to satisfy the pre-existing rights of Imperial Valley farmers.

28. *See,* Wilbur Letter at Con. Apx. 177a; 43 C.F.R. § 230.70.



limitation with the sale of a water right, the fact that Congress explicitly prohibited any charge for delivery of water to Imperial Valley was reflective of a belief that Imperial Valley, because of its vested pre-project water rights, was not an appropriate case in which to impose an acreage limitation.[29]

As late as 1941, the relationship between the sale of supplemental water and acreage limitation was thought to be crucial to application. B. P. King, in his exhaustive study of the acreage limitation laws, concluded for that very reason that the § 1 proviso in the Project Act precluded application of acreage limitation. King stated:

> ". . . even if the Boulder Canyon Project Act should be interpreted as bringing into operation all general provisions of the reclamation laws, it is still doubtful that there are any excess lands restrictions applicable under the facts presented. *The All-American Canal project does not involve the sale of supplemental water or water rights* since by section 1 of the Boulder Canyon Act it is stipulated that: 'No charge shall be made for the use, storage, or delivery of water for irrigation . . . purposes in the Imperial or Coachella Valleys.'" KING, EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS, App., p. 4 (1941); LX-BO, App., p. 4.

The legislative discussion of the § 1 proviso supports the interpretation Wilbur and later B. P. King placed on it. Thus, during the debates on the Project Act, Senator King explained that the basis for the § 1 proviso was the intent to recognize Imperial's existing rights:

> "[T]he lands in the Imperial Valley which have been irrigated have, perhaps a vested right, and it might be

29. This point of view is demonstrated in the analysis by the Bureau's Chief Counsel, Porter Dent, who noted that Secretary Wilbur's rationale with respect to § 5 of the 1902 Act was also probative of the inapplicability of § 46 of the 1926 Act. "In my view," he said, "the same principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act, involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect." LX-AR, pp. 1-2; Con. Apx. 179a-180a.

questionable whether we have the power to impose a charge upon them for the use of water. At any rate, I gave them the benefit of all doubt, and I have offered this amendment, the effect of which if adopted, will be that the Imperial Valley and the Coachella Valley will not be required to make payment for storage waters." 70 *Cong. Rec.* 528.

The congressional directive not to charge for use of water in Imperial Valley was, in effect, an express acknowledgment of the status quo and a command not to disturb it. That command was plainly inconsistent with any intention to disrupt the status quo by denying water to those who were then using it and by requiring breakup of their farms.

### C. The Inclusion in § 9 of an Acreage Limitation Provision as to Public Lands and the Omission of any Corresponding Provision for Acreage Limitation as to Privately-Owned Lands Strongly Indicate that Congress Did Not Intend Imposition of Acreage Limitations on Private Lands.

In § 3 of the 1902 Act, Congress provided that if *public land* within a project were opened to entry, homesteads should be limited to tracts not exceeding 160 acres. In § 5 it made provision for a comparable 160-acre limitation in the case of sale of water rights to *private lands.* Beginning with this first enactment, general reclamation law has contained separate but closely parallel provisons for public lands, on the one hand, and for private lands, on the other.

In the Project Act, by contrast, Congress enacted an explicit provision in § 9 limiting *public lands* to "tracts . . . not exceeding one hundred and sixty acres," but conspicuously omitted any comparable provision for acreage limitation as to private lands. The very fact that Congress enacted § 9 shows that it gave thought about the extent that it wanted acreage limitation to be applicable under the Project Act. Likewise, § 9 shows the way that Congress thought that provision for acreage limitation ought to be covered — by words explicitly stating its intent. Having spelled out its intention to apply acreage limitation to public lands that might be served by the project, Congress



surely would also have expressly provided for acreage limitation as to private lands if it had intended that result. Having explicitly addressed the subject as to public lands, there was only one reason for Congress to remain silent about private lands: it did not in fact intend imposition of acreage limitation on such lands.

### D. Section 4(b) of the Project Act Establishes a Contracting System Plainly Inconsistent with That of § 46 of the Omnibus Adjustment Act of 1926.

Reimbursement of the Government for the All-American Canal is covered explicitly by § 4(b) of the Project Act, which provides in material part that:

> "Before any money is appropriated for the construction of said main canal and the pertinent structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California . . . the Secretary of the Interior shall make provisions for revenues by contract, or otherwise, adequate in his judgment to ensure payment of all expenses of construction, operation and maintenance of said canal and appurtenant structures in the manner provided in the reclamation law."

The Ninth Circuit held that the phrase "in the manner provided in the reclamation law" means that § 46 of the 1926 Act must govern the repayment contract for the All-American Canal. "At that time the portion of the reclamation law governing contracts for repayment of costs . . . was Section 46." 559 F.2d at 527. This ignores that fact that the text of § 4(b) distinguishes between (1) the means used to secure repayment ("contract or otherwise"), and (2) the terms and accounting conventions for repayment ("in the manner provided in the reclamation law").[30] The

30. As shown more fully below, the legislative history fully supports this interpretation. *See,* pp. 51-53, *infra.* The fiscal conventions for repayment under reclamation law include such things as the absence of any interest obligation, segregation of construction costs from operating and maintenance costs with different standards applicable to reimbursement of each, exclusion of certain administrative costs from the reimbursement obligation, and deferral of the first installment obligation until completion of construction.

reference to reclamation law refers only to the latter. It does not specify that the means of securing repayment be a § 46 contract, but leaves the means to the Secretary's discretion.

That § 4(b)'s reference to reclamation law was not intended to require a § 46 contract is made evident by the obvious inconsistency between the means of repayment contemplated in the first part of § 4(b) and the § 46 means which would have been mandatory if the authors had intended § 46 to govern. Section 46 of the 1926 Act establishes a specific, unitary and mandatory means of securing repayment on new reclamation projects. It provides that

> "No water shall be delivered on the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under state law providing for the payment by the district or districts of the cost of construction, operating and maintaining the works during the time they are in the control of the United States. . . ." 43 U.S.C. § 423e.

Nothing could be more obvious than the fact that the means authorized by § 4(b) of the Project Act for securing repayment are inconsistent with § 46 of the 1926 Act. While § 46 is mandatory in requiring a contract, § 4(b) does not require the Secretary to obtain any contract at all. While § 46 is explicit in requiring a joint liability contract with an irrigation district, § 4(b) of the Project Act leaves the contracting entity, if any, to the discretion of the Secretary. And while § 46 contemplates a contract *after* construction of work but *before* delivery of water, § 4(b) *requires* that provision for repayment *precede* construction.[31]

The Ninth Circuit brushed aside the inconsistency between the absolute requirement of a joint-liability contract

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31. The Bureau of Reclamation's Chief Counsel, Porter Dent, emphasized in his March 1, 1933 letter to the District that this critical distinction between § 4(b) of the Project Act and § 46 of the 1926 Act supported the Department's conclusion that § 46 was not made applicable by the Project Act to Imperial Valley. LX-AR, p. 2; Con. Apx. 179a-81a.



in § 46 and the fact that the Project Act explicitly permitted the Secretary to dispense with any contract at all. It satisfied itself with the statement that "[w]hatever might have been the case if the Secretary had 'otherwise' insured repayment, the method chosen in the case of Imperial Valley was a contract." 559 F.2d at 530. This statement is a truism that proves nothing. Because the Secretary entered into a contract pursuant to §4 (b) does not mean that such contract was a § 46 contract. On the contrary, as above indicated, the Secretary's contract *could not* comply both with the terms of § 46 and the terms of § 4(b). One must give way, and as a specific provision of the controlling statute, § 4(b) must be deemed to prevail and to override § 46.

### E. The General References to Reclamation Law in § 14 And Elsewhere Have a Reasonable Meaning Which Does Not Imply Application of Acreage Limitation Requirements in Imperial Valley.

Section 14 provides that:

> "This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the *construction, operation, and management* of the works herein authorized, *except as otherwise herein provided.* 43 U.S.C. § 617m.

Respondents and the court below have relied heavily on this general reference to reclamation law as incorporating the acreage limitation provision in § 46 of the 1926 Act. However, there are two fundamental reasons why this position is wrong. First, by its own terms — "except as otherwise herein provided" — § 14 is expressly subordinated to the specific provisions in the body of the Act. And, as previously noted, the specific provisions in the body of the Act cannot exist side by side with an implied application of § 46. The mandate in § 6 for satisfaction of present perfected rights precludes implication of the § 46 acreage limitation provisions; § 1 indicates the same intent to satisfy Imperial's pre-existing rights; and the repayment provisions in § 4(b) are directly contradictory to the provisions governing § 46 contracts.

Second, § 14 makes reclamation law applicable only to the "construction, operation and management" of project works. As the district court found (322 F. Supp. at 17), these words have a particular and limited meaning in the idiom of the statute. They refer to the business and fiscal aspects of project management, and not to matters of social control, such as acreage limitation, governing water deliveries. This conclusion is the same one that was reached by B. P. King in his definitive study of the excess land laws, which was compiled for the Bureau of Reclamation in 1941. After analyzing the Project Act, King concluded as follows with respect to the language of § 14:

> "The specific language [of § 14] in this case is that the reclamation law 'shall govern the construction, operation and management of the works.' 'Operation and management,' of course, are terms susceptible of broad definition, but it seems doubtful that these terms could be construed as bringing into operation the excess lands restrictions. 'Operation and management' appears to connote the business aspects of control, rather than social policy aspects. If Congress had intended to make the excess lands restrictions operative, it seems a reasonable assumption that some such language as follows would have been used:
>
> > 'Which said reclamation law shall govern the construction, operation and maintenance of said works and the use of water therefrom.'" LX-BO, App., pp. 3-4.

Analysis of the balance of the Project Act bears out the point that the 1928 Congress consistently used the words "construction, operation and management" in a sense wholly distinct from "delivery" of water, which is the function affected by acreage limitations.[32] Perhaps such separation would have little significance if it occurred only once, but where the same distinction is carefully expressed

32. For example, the Project Act distinguishes between, and treats separately, the Secretary's authority to enter into contracts for the "construction, operation and maintenance" of the Project facilities, and his authority to enter into contracts for "delivery" of irrigation water. Section 10 authorizes:

*(Footnote continued on next page.)*



in four widely separated parts of the Act, there is a strong inference that Congress ascribed a meaning to the distinction. Thus, when Congress used the phrase "construction, operation and management" in § 14 with reference to general provisions of reclamation law, it is logical to conclude that Congress did not intend this phrase to incorporate provisions of general reclamation law governing "delivery" or "use" of water.

The conclusion that § 14 had a limited purpose and was never intended as a wholesale incorporation of reclamation law is confirmed by § 9's elaborate provisions for applying

> ". . . . The Secretary of the Interior . . . to enter into contract or contracts with said district or other districts, persons or agencies for the *construction*, in accordance with this Act, of said canal and appurtenant structures, and also for the *operation* and *maintenance* thereof, with consent of the other users." 43 U.S.C. § 617i.

Section 5 separately authorizes the

> "Secretary . . . to contract for storage of water in said reservoir and for the *delivery thereof* at such points on the River and on said canal as may be agreed upon, for irrigation and domestic uses. . . ." 43 U.S.C. § 617d.

The provisions of the Act relating to reimbursement of the Government also distinguish between payments for the "construction, operation and maintenance" of the canal and payments for "use, storage and delivery of water." Thus, § 1 provides:

> ". . . That no charge shall be made for water or for the use, storage or *delivery* of water for irrigation . . . in the Imperial or Coachella Valleys. . . ." 43 U.S.C. § 617.

On the other hand, § 4(b) provides that charges shall be made for "construction, operation and maintenance" of the canal, again clearly indicating that "delivery" was treated separately from "construction, operation and maintenance." 43 U.S.C. § 617c(b).

The same distinction is preserved in § 8, where Congress directed that *both* "construction, operation and maintenance" *and* "delivery and use of water" were to conform to the Colorado River Compact. Section 8 employs language distinguishing "delivery" of water from "construction, operation and maintenance" of works. It provides that the Colorado River Compact shall govern:

> ". . . the construction, management and operation of said reservoir, canals and other works *and* storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in this Act to the contrary notwithstanding. . . ." 43 U.S.C. § 617g.

acreage limitations and other reclamation law provisions on public lands. As previously noted, § 9 limits entries on public lands to 160 acres, precisely the limitation also found in § 3 of the 1902 Act. Section 9 also spells out a veteran's preference for entry of Imperial Valley public lands. That preference is almost identical to the preference found in general reclamation law.[33] In addition, § 9 specifically directs that subsection C of § 4 of the Fact Finder's Act (43 U.S.C. § 433) be applicable to entrymen on public lands opened for entry as a result of the Project, even preferred veterans.

If Congress had believed that it was incorporating all provisions of reclamation law by adopting § 14, the elaborate provisions in § 9 would serve no purpose. Everything that § 9 directs would have been mandated by general reclamation law provisions supposedly incorporated by § 14. The fact that Congress felt it necessary to spell out land-use provisions in § 9 that were substantially identical to provisions already contained in the general reclamation law confirms that Congress did not believe that § 14's general reference to reclamation law had the effect of mandating application of the land-reform provisions of reclamation law in Imperial Valley.

Ultimately, if there were any doubt about the foregoing interpretation of § 14's limited scope, it is dispelled by the legislative history. As next discussed, the legislative history confirms that no one in the 1928 Congress intended that § 14 would silently incorporate an acreage limitation requirement applicable to private lands in Imperial Valley.

## III. THE LEGISLATIVE HISTORY OF THE PROJECT ACT AS A WHOLE CLEARLY INDICATES THAT CONGRESS DID NOT INTEND TO APPLY ACREAGE LIMITATIONS TO IMPERIAL VALLEY.

The history of the Project Act was fully examined by the Court in *Arizona v. California*, 373 U.S. at 551-61. There is

33. The only distinction was that the general reclamation law provided for a preference of 90 days or more, while § 9 provided for a preference of three calendar months. 43 U.S.C. § 186.



no need to repeat here the broad outline of that history.[34]

34. The first of the Swing-Johnson bills were introduced in 1922. S. 3511, 67th Cong., 2d Sess., 62 *Cong. Rec.* 5929 (April 25, 1922); H.R. 11449, 67th Cong., 2d Sess., 62 *Cong. Rec.* 5985 (April 25, 1922). Extensive hearings were conducted by the House Committee on Irrigation of Arid Lands. *Hearings on H.R. 11449,* House Comm. on Irr. of Arid Lands, 67th Cong., 2d Sess., Parts. I-V (1922-23). Neither the Senate nor House bill was reported out of committee. In 1923, Swing and Johnson again introduced identical bills. S. 727, 68th Cong., 1st Sess., 65 *Cong. Rec.* 146 (Dec. 10, 1923); H.R. 2903, 68th Cong., 1st Sess., 65 *Cong. Rec.* 217 (Dec. 10, 1923). Hearings were conducted in both houses. *Hearings on S. 727,* Senate Comm. on Irr. & Rec., 68th Cong., 2d Sess., Parts I-II (1924-25); *Hearings on H.R. 2903,* House Comm. on Irr. & Rec., 68th Cong., 1st Sess., Parts I-IX (1924). Again, neither bill was reported out of committee. Johnson and Swing renewed the effort in 1925, again introducing companion bills. H.R. 6251, 69th Cong., 1st Sess., 67 *Cong. Rec.* 1313 (Dec. 21, 1925); S. 1868, 69th Cong., 1st Sess., 67 *Cong. Rec.* 1232 (Dec. 21, 1925); H.R. 9826, 69th Cong., 1st Sess., 67 *Cong. Rec.* 4730 (Feb. 27, 1926); S. 3331, 69th Cong., 1st Sess. (Feb. 27, 1926). After hearings before the Senate Committee on Irrigation and Reclamation, *Hearings on S. Res. 320,* Senate Comm. on Irr. & Rec., 69th Cong., 1st Sess., Parts I-IV (1925), one of the Johnson bills, S. 3331, was reported out of committee with a recommendation for passage, but it did not come to a vote on the floor. *S. Rep. No. 654,* 69th Cong., 1st Sess. (1926). In the House hearings were held on the Swing bill. *Hearings on H.R. 6251 and H.R. 9826,* House Comm. on Irr. & Recl., 69th Cong., 1st Sess., Parts I-II (1926); *Hearings on H.R. 9826,* House Comm. on Rules, 69th Cong., 2d Sess., Parts I-III (1927). H.R. 9826 was reported favorably out of committee, *H. Rep. No. 1657,* 69th Cong., 2d Sess. (1926), but did not come up for a vote. In 1927, during the first session of the 70th Congress, Swing introduced H.R. 5773, and Johnson, S. 728. H.R. 5773, 69 *Cong. Rec.* 97 (Dec. 5, 1927); S. 728, 69 *Cong. Rec.* 341 (Dec. 9, 1927). After hearings, *Hearings on H.R. 5773,* Before the House Comm. Irr. & Recl., 70th Cong., 1st Sess., Parts I-IV (1928), the House Committee reported favorably on H.R. 5773. *H. Rep. No. 918,* 70th Cong., 1st Sess. (1928). The Bill passed the House on May 25, 1928. In the Senate, hearings were held on S. 728 (*Hearings on S. 728 and S. 1274,* Senate Comm. on Irr. & Recl., 70th Cong., 1st Sess. (1928), and it was reported out of committee on March 20, 1928, *S. Rep. No. 592,* 70th Cong., 1st Sess. (1928). Debate on the Senate floor prevented a vote on S. 728 during the first session. At the beginning of the second session, the Senate undertook consideration of H.R. 5773, which had passed the House. Under the

*(Footnote continued on next page.)*

Of concern here is that part of the history which bears on the congressional understanding of the effect that the statutory language would have on applicability of acreage limitation in Imperial Valley. Examination of this history shows that the administrative practice initiated by Secretary Wilbur in 1933 faithfully reflected the congressional intent.

**A. Congress Understood That An Explicit Provision Would Be Needed If It Wished To Impose Acreage Limitation in Imperial Valley, And Congress Deliberately Excluded Such A Provision From The Bill Adopted.**

**1. The Hearings on the Swing-Johnson Bills show that Congress did not intend that land limitation provisions would be made applicable to Imperial Valley merely by general references to the Reclamation Law.**

Section 14 of the Project Act first appears as § 13 of H.R. 9826, the fourth of the Swing-Johnson bills, LX-E, p. 30. During the hearings on H.R. 9826, a question arose as to whether the bill would subject private lands in the Imperial Valley to acreage limitations. Congressman Phil Swing, the author of the bill, and Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, both stated unequivocally that the bill would not make acreage restrictions applicable in Imperial Valley:

"Mr. SINNOTT. I would like to ask the doctor is there any provision in the bill sponsored by the Secretary on the farm unit on the lands to be irrigated?

"Doctor MEAD. This bill does not go beyond provisions for three things. One is the dam — the reservoir — and the second is the power plant, and the third is the All-American Canal. It does not deal with irrigation of new lands at all.

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floor management of Senator Johnson, S. 728 was substituted as an amendment to H.R. 5773, and in that form the bill passed the Senate on December 14, 1928. Four days later the House passed the Senate-substituted version of the bill, and it was signed by President Coolidge on December 21, 1928.



"The CHAIRMAN [Congressman Addison T. Smith]. That is reserved for future legislation?

"Doctor MEAD. Yes, Sir.

"Mr. SINNOTT. But as to the old land —

"Doctor MEAD. As to the old land, it would be sold water under a Warren contract.

"Mr. SINNOTT. *The present owner can occupy his present farm unit?*

"Doctor MEAD. *Yes, sir.*

"Mr. SINNOTT. No matter what that might be?

"Doctor MEAD. *Yes.*

"Mr. SINNOTT. What is that now in the Imperial Valley?

"Doctor MEAD. Of course, it varies widely. There is not any law. There are a good many large holdings there.

"...

"Mr. SINNOTT. What is it Mr. Swing?

"Mr. SWING. I think outside of one or two large holdings that the average is about 80 acres, taken by and large. The average will run around 80-acre tracts. There are some over a thousand acres.

"...

"Mr. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, *as is now in the present reclamation law*?

"Mr. SWING. *No, sir.*" *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess., pp. 32-33 (1926); LX-DD(D).

This portion of the legislative history is of crucial importance. As previously noted, the bill under consideration had a provision, then in § 13, which was identical to § 14 of the final Project Act. Congressman Sinnott

asked whether "*any* provision in the bill" would limit acreage, and Commissioner Mead answered that none would. Similarly, Congressman Swing focused on the entire bill, in stating that there was nothing in it that would require acreage limitation. Moreover, it is important to note that in his final question Congressman Sinnott explicitly asked whether anything in the bill would require the sale of excess lands "as is now in the present reclamation law". This question undeniably shows that members of the Committee did not believe that the general reference to reclamation law in § 14 would incorporate acreage-limitation provisions "now in the present reclamation law."[35] And just as plainly, Congressman Swing and Commissioner Mead were telling them that their understanding was correct.[36]

**2. Insertion of an acreage limitation provision, and its deletion from the final bill.**

(a) **H.R. 9826.** After completion of the 1926 hearings on H.R. 9826, Congressman Leatherwood of Utah, a persistent critic of the bill, prevailed upon the House Committee to

35. "These hearings were held in February and March of 1926, while Section 46 was not enacted into law until May of 1926." 559 F.2d at 533. However, at that time § 12 of the Reclamation Extension Act of 1914, a forerunner of § 46, provided that no water should be delivered to an owner of lands exceeding 160 acres until he had agreed to sell the acreage at a price set by the Secretary. 38 Stat. 689, 43 U.S.C. § 418.

36. Similarly, during the 1924 House hearings on H.R. 2903, the second Swing-Johnson bill, Congressman Raker questioned whether it might not be advisable to impose acreage restrictions on the owners of any undeveloped lands which might be brought under irrigation by the project works. In response, Arthur P. Davis, co-author of the Fall-Davis Report and the former Director of the Reclamation Service, noted that there were several acreage limitation provisions in general reclamation law. Even though the bill contained a provision like, § 4(b) of the Project Act, calling for "reimbursement in accordance with the terms of repayment prescribed in . . . the reclamation law" (LX-B, p. 2), both Raker and Davis agreed that the acreage limitations of the general reclamation law would *not* apply without specific provision to that effect in the bill. As Davis put it, "something" more specific would have to be put in the bill. *Hearings on H.R. 2903,* 68th Cong., 1st Sess., p. 1448 (1924); LX-DD(B).



insert an acreage limitation provision in § 1. Congressman Leatherwood asked for this provision because he recognized that the bill, as it stood, would not impose such a limitation in Imperial Valley. This is what Swing and Mead had told the Committee, including Congressman Leatherwood, at the hearings. This is what the Committee had been told two years earlier at hearings on similar legislation (*see* fn. 36), and this is what every congressional discussion of the acreage limitation issue took for granted during the entire proceedings on the Swing-Johnson bills. It was clearly understood that if acreage limitation were to apply, an express provision would be required: acreage limitation could not be implied through the backdoor with § 14's general reference to reclamation law. H.R. 9826, amended as proposed by Leatherwood, was reported out by the House Committee, but it never came up for a vote.

(b) **S. 3331.** While proceedings were going forward on H.R. 9826, Senator Johnson's companion bill, S. 3331, cleared Committee and was debated on the floor of the Senate. S. 3331 contained a provision identical to § 14 of the Project Act. LX-F, p. 13. There is *no* evidence that any senator believed that S. 3331 taken as a whole would make acreage limitation applicable to Imperial Valley. There is, however, very strong evidence that the Senate *did not* believe that the general language of incorporation would make acreage limitation applicable.

Thus, Senator Phipps of Colorado offered an amendment to § 5 of S. 3331 which, if accepted, would have provided that "all contracts for the delivery of water for irrigation purposes" must include acreage limitation provisions similar to those required by § 46 of the 1926 Act. LX-DA, p. 2. Phipps also offered a substitute bill, and in § 5(b) it contained recordable contract and acreage limitation provisions worded similarly § 46 of the 1926 Act. LX-CU, pp. 6-7. Importantly, this substitute bill, like S. 3331 contained general language of incorporation identical to that found in § 14 of the Project Act. LX-CU, p. 16.

Senator Phipps' amendments are particularly significant in light of the fact that "it could hardly have escaped the

attention of the Senate that at that time the reclamation law also provided significant acreage limitations in its provisions for contracts with irrigation districts." 559 F.2d at 533. Senator Phipps was the Chairman of the Senate Committee on Irrigation and Reclamation. He had participated in all the Senate hearings on the Swing-Johnson bills. Although Phipps was well aware of the provisions of general reclamation law imposing acreage limitation, it plainly was his understanding that the general language of § 14 of the Project Act would not make those provisions applicable in Imperial Valley. Surely, if a contrary view had ever been expressed in the Senate proceedings Phipps would have been aware of it. Undoubtedly, if he had ever heard such a contrary view and given it credence, he would not have found it necessary to urge explicit language on acreage limitation over and above general reference to reclamation law.

(c) **S. 728 — The Boulder Canyon Project Bill.** When the 70th Congress convened, Swing and Johnson introduced new bills. The House bill, H.R. 5773, contained the explicit acreage limitation proviso which had been inserted into H.R. 9826 at Congressman Leatherwood's insistence during the prior session. LX-I, pp. 2-3. Johnson's bill, S. 728, did not contain any such provision. LX-J, pp. 1-2. This was the first time that the companion bills introduced by Swing and Johnson differed materially in their wording. In these circumstances, the omission from S. 728 of language parallel to the acreage limitation proviso in H.R. 5773 cannot be deemed to have been inadvertent.

During the Senate Committee's deliberations on S. 728, Senator Ashurst proposed adding the acreage limitation language contained in § 1 of the House bill. The Committee refused this proposal. *S. Rep. No. 592,* 70th Cong., 1st Sess., part II, pp. 3, 5, 26 (1928); LX-DD(J). Section 13 of S. 728 was identical to § 14 of the final act. LX-J, p. 18. Quite obviously, if this general language had been understood by anyone to mandate incorporation of § 46, Senator Ashurst's proposed amendment would have been unnecessary.



The Senate Committee also had before it a bill authored by Senator Phipps, S. 1274. As with Phipps' earlier bill, S. 1274 was an alternative to Johnson's bill and included an express acreage limitation provision. LX-DD(H), pp. 2-3. S. 1274 also included language identical to § 14 of the Project Act. *Id.* at 5. Again, the express acreage limitation language contained in S. 1274 would have been unnecessary if Phipps and his colleagues had construed the bill's general references to reclamation law as incorporating the acreage limitation scheme of § 46 of the 1926 Act.

When S. 728 was reported out of the Committee on Irrigation and Reclamation, Senator Ashurst filed a minority report. He objected to S. 728's failure to include an acreage limitation provision applicable to private lands:

> "I object to this Bill for the following reasons:
>
> "...
>
> "13. Because the Bill authorizes the expenditure of $50 million of federal funds to irrigate lands owned largely by private land speculators in California on units in excess of 160 acres. . . .
>
> ". . . I offered an amendment before the Committee that would subject the privately owned lands to the same conditions as lands in other irrigation projects privately owned, so that no water user might secure water for land in excess of 160 acres. This amendment is not included in the Bill as reported to the Senate." *S. Rep. No. 592,* 70th Cong., 1st Sess., part II, pp. 3, 5, 26 (1928); LX-DD(J).

Thus, as S. 728 cleared Commitee and came before the entire Senate, the issue had been drawn as to whether acreage limitation should be imposed in Imperial Valley. Early in the floor debates Senator Hayden offered an amendment to § 9 that would have imposed limitations on private lands, comparable to that section's 160-acre limitation for

public lands. 69 *Cong. Rec.* 7635; LX-DD(M). Hayden spoke in support of this amendment at length, arguing that S. 728 contained no provisions which would restrict water deliveries to privately owned lands. 69 *Cong. Rec.* 7634-35; LX-DD(M). He contended that Congress in the past had "adopted a very definite policy . . . of limiting the acreage in private ownership," and read the recommendations made from the *Fact Finders' Report* for effective anti-speculation measures. Hayden also read the land limitation provisions Congress had included in the 1924 statute authorizing the Coolidge Dam on the San Carlos Project. He emphasized that the House bill contained an express acreage limitation provision (the Leatherwood proviso), and stated that his amendment was intended to have an equivalent effect. A few days later, Hayden repeated his plea to amend the bill "by limiting the area to be furnished with water in any one ownership to 160 acres and requiring all excess lands to be sold at an approved price." 69 *Cong. Rec.* 9451; LX-DD(N).

Likewise Senator Ashurst continued his attack on the absence of an acreage limitation provision. On the floor of the Senate he repeated the objections contained in his minority report on S. 728, calling attention to the omission from the bill of the acreage limitation provision he had offered in Committee. 69 *Cong. Rec.* 10472, 10495; LX-CC(P), (Q). During the second session, a few days before ultimate passage of the Act, Ashurst repeated the same objections in another speech on the floor of the Senate. 70 *Cong. Rec.* 289; LX-DD(S).

The House passed Swing's H.R. 5773 (including the Leatherwood acreage limitation proviso) before the Senate completed action on S. 728. When H.R. 5773 was called up in the Senate, Senator Johnson moved to substitute the text of S. 728 (which contained no acreage limitation provision) as an amendment in the nature of a substitute for H.R. 5773. LX-Q. This motion carried, thereby deleting the express acreage limitation originally proposed by Congressman Leatherwood.

While it is true, as Senator Johnson said that S. 728 and H.R. 5773 were similar bills having " 'like purposes' and



'like designs' " (559 F.2d at 534), it is plain from the record that the Senate did not view S. 728 as identical in effect to H.R. 5773. Moreover, after the substitution of S. 728, Senator Ashurst renewed his protest that the bill would not apply acreage limitations to private landowners in Imperial Valley. 70 *Cong. Rec.* 289. Under these circumstances, there can be no basis for assuming that Congress viewed the omission of H.R. 5773's acreage limitation provision from the final Act as meaningless. On the contrary, in both Houses, Congress had always been told that the Act would not apply acreage limitation in the Valley absent an explicit provision. It strains credulity to assume that in the final days of the legislative proceedings, on a matter of intense importance, Congress silently acted on an assumption no one had ever before suggested.

### B. The Legislative History Confirms that the Section 1 and Section 4(b) References to Reclamation Law Repayment Were Not Intended to Apply Acreage Limitation.

As previously discussed, the references in §§ 1 and 4(b), to "payment . . . in the manner provided by the reclamation law," can reasonably be construed to refer only to the terms of payment and fiscal conventions specified in the reclamation law. It has been pointed out that only such an interpretation gives meaning to each word of the section, since § 4(b) treats the mechanism for securing repayment ("contract or otherwise") separately from the repayment terms, and the reference to reclamation law applies only to the latter subject. *See,* pp. 37-39, *supra.* The legislative history of the evolution of §§ 1 and 4(b) confirms that the references to reclamation law contained in these sections were simply intended to specify the financial terms for repayment, and had nothing to do with acreage limitation.

Originally, § 4(b) merely required the Secretary of the Interior to make provision for revenues sufficient to pay for all the project works within 50 years. LX-Q, pp. 5-6. According to the financial projections, the revenues from power generation at the dam would have been sufficient to meet this requirement. Some in Congress were not willing

to have this happen, but wanted the farmers in Imperial Valley to pay for the canal. To overcome this objection, the Senate Committee amended the committee print of the last Johnson bill, adding to § 1 the following words:

> "The expenditure for such main canal and appurtenant structures to be reimbursable as provided in the reclamation law." *S. Rep. No. 592,* 70th Cong., 1st Sess. 1 (1928).

When the bill reached the floor, Senator Pittman explained the intent of this reference to reclamation law as follows:

> "MR. PITTMAN. . . . The intent of the amendment referred to, and which has been accepted by the Senator, is not to have the cost of construction of the All-American Canal a charge upon the assets received from the generation and sale of electrical energy at the dam." 70 *Cong. Rec.* 72.

A few days later, Senator Pittman proposed making a similar change in the wording of § 4(b):

> "Mr. PITTMAN. Now, Mr. President, in order to make the bill harmonious, having segregated the All-American Canal . . . from the Boulder Dam, the Black Canyon Dam, and the power-house project, it is essential to make subdivision (b) in Section 4 . . . conform to that. . . ." 70 *Cong. Rec.* 576.

Senator Pittman thereupon proposed an amendment to § 4(b) that would have required the Secretary to:

> "Make provision for revenues, by contract or otherwise, for the *storage of water and for the delivery thereof . . . in accordance with the provisions of the Reclamation Act,* adequate to ensure payment . . . *in the manner provided by the Reclamation Act.*" LX-CZ.

As is apparent from the language emphasized, the Pittman amendment would have referred to reclamation law twice, and in such a way as to provide *both* that delivery of water *and* the conventions for repayment would be governed by reclamation law. The introduction of Pittman's



amendment evoked an objection from Senator Johnson. 70 *Cong. Rec.* 526; LX-DD(T). On the next day, Pittman reread his amendment, and changed it to omit the language requiring that storage and delivery be "in accordance with the provisions of the Reclamation Act." *See* 70 *Cong. Rec.* 577; LX-DD(U). Senator Johnson obtained Pittman's confirmation that the reference to reclamation law governing delivery of water had been deleted, and then withdrew his objection. *Id.* As so changed, the amendment was adopted.

The significant point here is that when an amendment was offered that would have required the Secretary to provide for the storage and delivery of water "in accordance with the provisions of the Reclamation Act," the sponsor of the bill objected to such amendment, and the offending language was withdrawn. This, then, is clear evidence that the authors of § 4(b) acted to assure that the mention of reclamation law in that section refer only to the terms and fiscal conventions of repayment.

**C. Overview of the Statute's Language and History.**

In *Arizona v. California,* 373 U.S. 546 (1963), the Court observed that the "meaning and scope" of the Project Act "can be better understood when the Act is set against its background." *Id.* at 552. That background involved issues of interstate and international consequences quite different from the undertakings that had characterized the reclamation program up through 1928. Especially in the 1920's, the "unique size and multistate scope of the Project" was unprecedented. *See California v. United States,* 438 U.S. 645, 674 (1978). Imperial Valley, too, was then, as it is now, unique. This is and was especially true with regard to Imperial's fully developed and operating irrigation system. Apart from the respect that Congress accorded to Imperial's accomplishment, it is plain that the legal and legislative environment of the 1920's fostered an attitude of deference to Imperial's existing rights. As Senator King had said at one point, "[i]t might be questionable whether we have the power to impose a charge on them for the use of water." 70 *Cong. Rec.* 528.

So much has changed since the 1920's that it is difficult, if not entirely impossible, to deduce today the state of mind that legislators were likely to have had some 50 years ago. The objective evidence of what people of the same time thought the statute meant, therefore, comes with a stamp of accuracy that is not to be lightly ignored. Porter Dent, the Bureau's Chief Counsel and the real source of the original interpretation of the Project Act, did not suffer from the disability of trying to recreate the thinking of a legislature 50 years before his time. Dent was acting in the same times and environment as the legislators who had adopted the Project Act. Likewise, Reclamation Director Davis and Commissioner Mead were contemporaries of the events, and full-time professionals of long standing in the federal reclamation program. When they told Congress what reclamation practice was or how language would be interpreted, their views reflected the understanding of the day. Their analysis was not subject to the risk of distortion from subsequent events that threatens *de novo* analysis today. In *California v. United States,* the Court stressed the practical truth that the history, policy and expectations of all concerned would have been much fresher in the minds of those then in Government than it is to us today. 438 U.S. at 648. The same truth is just as obvious here. Deference is due the construction placed on the Project Act by Porter Dent, and even before him by everyone within the Bureau of Reclamation who had given attention to the matter (LX-AM-p. 2), because that construction is likely to be the correct one. That likelihood is all the greater in view of the total absence of contemporary disagreement or criticism. Dent's interpretation was not only approved and published by Secretary Wilbur, it was knowingly followed and used by his immediate successor, Secretary Ickes, and made the basis of the Government's commencement of the construction of the All-American Canal. This contemporary acceptance of the Act's meaning cannot be rationalized away, even if it would appear to present-day eyes that a different reading would be wise or preferable.

Accuracy, however, is only one compelling reason for deference to the original practice. Fairness and practicality are equally important. In *Tallman,* the Court noted that private reliance was one of the important reasons for adhering to an established administrative construction, and that in the face of such reliance "[i]f . . . the Secretary's interpretation is not *un*reasonable," it must be upheld. 380 U.S. at 17-18. The fact of long and justifiable reliance cannot seriously be questioned here, especially in light of the express confirmation in *Hewes v. All Persons* that no provision of federal law called for imposition of acreage limitation in Imperial Valley. *See pp. 60-61, infra.*



Reliance is not the only consideration of practicality dictating adherence to the longstanding interpretation of the Project Act. The simple truth is that none of the goals that might have been argued in 1928 as a basis for imposing acreage limitation in Imperial Valley can be achieved in this case or at this time. If the purpose of an acreage limitation is to promote settlement and family farms, that purpose was never intended to be achieved by disrupting settled communities or forcing people to give up the results of a lifetime or even of generations of family farming. If acreage limitation is meant to prevent speculation, forcing those who purchased their lands at market prices during the intervening years to sell now at prices drastically below market values is to *create* an opportunity for speculation, not to prevent it. Finally, if the purpose of acreage limitation is supposed to be a "breakup" of pre-project ownerships, the record makes it clear that such purpose cannot now be served. Those who were "pre-project" owners have long since passed from the scene. Today's farmers, like petitioners, have acquired their lands over the years since 1933. Forcing a "breakup" today is nothing less than to require those people who have made a success of their farming careers to forfeit the reward of those labors. Instead of making the federal cooperation in the irrigation undertaking a guarantee of opportunity, it would be made an arbitrary punishment for success.

The foregoing review of the statute and its history makes it clear that the original interpretation of the Project Act published by Secretary Wilbur cannot be found unreasonable. Wilbur's interpretation comports with the

statutory language and is virtually compelled by the legislative history. The arguments against it are weak and technical. More importantly, they are inevitably colored by developments in the law and government that long postdate the enactment in question. It is precisely in this regard that the rule of *Tallman* serves its best purpose. There is no need to trouble over *how* reasonable Wilbur's original interpretation of the Project Act was. It certainly cannot be found *un*reasonable, and that ends the need for further inquiry.

## IV. THE NINTH CIRCUIT'S REFUSAL TO HONOR THE STATE-COURT CONFIRMATION JUDGMENT IN *HEWES v. ALL PERSONS* VIOLATED FUNDAMENTAL PRINCIPLES OF RECLAMATION LAW AS WELL AS THE DUTY TO ACCORD THAT JUDGMENT FULL FAITH AND CREDIT.

The fundamental issue here — whether acreage limitation applies to Imperial Valley — was litigated in a proceeding required by the Government and designed to resolve all issues that could affect the validity of the All-American Canal Contract. That proceeding, *Hewes v. All Persons,* resulted in a final judgment that acreage limitation did not apply. In rejecting that holding, the Ninth Circuit disregarded not simply the judgment, but California's entire process governing irrigation district contracts. In effect, the decision of the court below would impose upon Imperial Valley a new contract never approved in accordance with state law. Such result directly contravenes a strong federal policy of deferring to the form and the substance of state water law procedures. Moreover, the Ninth Circuit worked that breach of federal policy, by failing to meet its equally fundamental obligation to accord the *Hewes* judgment full faith and credit.

It is undisputed in this case that the All-American Canal Contract does not, by its terms, call for acreage limitation. This absence is not a result of accident or oversight; the written contract accurately expresses the intention of the parties that acreage limitation would not be imposed.



3 Tr. 221, 240-41 (Weinberg). As Secretary Wilbur said, "early in the negotiations connected with the All-American Canal Contract, the question was raised regarding whether and to what extent the 160-acre limitation is applicable to land to be irrigated from this canal. Upon careful consideration, the view was reached that this limitation does not apply to lands now cultivated and having a present water right." LX-AO, Con. Apx. 177a.

Another indisputable principle in this case is the fact that federal law required that the All American Canal Contract be entered in compliance with procedures specified by California law. Project Act § 18; 43 U.S.C. § 617q. At the relevant time, California law mandated elaborate procedures to be followed.[37] In addition to the usual requirement that the contract be approved by the District's board of directors, it had to be approved at a general election of the District, and its validity had to be confirmed by judicial decree in an action in which *any* interested person was entitled to be heard.

As certain as the foregoing is the fact that the All-American Canal Contract of December 1, 1932 was entered in scrupulous compliance with the applicable California law. Article 31 of the contract explicitly required the election and confirmation proceeding mandated by California statute. LX-AD, pp. 29-30. The Government not only obligated the District to take these steps, it assiduously monitored their progress, and in the confirmation action, its officers continually advised and counseled the district's lawyer. LX-AP, AR.

The decision below purports to create an entirely different contract by main force. The happenstance that the decision creating that contract violates elementary principles of the law of *res judicata* should not be allowed to obscure the fact that the Ninth Circuit's decision was far

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37. *See* California Irrigation District Act of 1917, 1917 Cal. Stat. 243; California Irrigation District Act of 1897, 1897 Cal. Stat. 254.

more than the abrogation of the *Hewes* judgment. Separate from that error, the Ninth Circuit's decision purports to create a new contract binding on Imperial Irrigation District despite the fact that the steps mandated by the California irrigation district law have never been (and as a practical matter, cannot be) taken. This end run of the terms and purposes of California law violates the clear congressional purpose of deference "to the substance as well as the form of state water law." *See, California v. United States,* 438 U.S. at 675. Even if *res judicata* were not applicable, the long-standing federal policy of compliance with state water law precludes imposition of acreage limitation where the Government knowingly negotiated a contract that intentionally excluded acreage limitation, where that contract has long since become final under state procedures endorsed and adopted by federal law, and where the contracting district has irrevocably lost those practical alternatives that Congress did not intend to take from the district without its agreement.

With good reason, California and most irrigation states mandate these elaborate procedures to insure in every possible way that an irrigation district's water service contract will be fixed, final and thereafter immune from public or private interference. The need for these protections is obvious. Usually, such contracts form the basis for the economy of an entire region. Inevitably, people will accommodate their lives, their businesses and their estate plans to the conditions resulting. Banks and other financial institutions will loan large sums for land acquisition, improvements and equipment, all based on the stability of a farm economy based on the irrigation contract. Likewise, municipal governments, school districts and other public service agencies will be organized and financed in accordance with the status quo. Clearly, state government is concerned that irrigation district contracts not be entered against the will of the people affected, and that once entered, the effect of such contracts will be immune from disturbance.



The means chosen by California to secure these ends include a general election to approve the contract, followed by the requirement of an *in rem* confirmation judgment.[38] Congress has explicitly embraced the use of confirmation actions to finalize Bureau of Reclamation contracts. The Act of May 15, 1922, for example, authorizes irrigation district contracts, but provides that such contracts are not binding upon the Government "until the proceedings on the part of the District for authorization of execution of the contract with the United States shall have been confirmed by a decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid." 42 Stat. 541, 43 U.S.C. § 511. In affirmatively claiming the benefit of state confirmation actions, Congress anticipated that *"all phases of the case"* would be "placed before the court for its consideration." 62 *Cong. Rec.* 3573. Inevitably, this expectation extended to issues of federal reclamation law, for the validity of such contracts could scarcely be determined without determination of reclamation law questions. Consistent with this expectation, the most important cases defining the requirements of federal law in the reclamation field have been confirmation actions. *E.g., Ivanhoe Irr. Dist. v. All Parties,* 47 Cal. 2d 597, 306 P.2d 824 (1957), *rev'd. on other grounds, Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958); *In re Owl Creek Irr. Dist.,* 71 Wyo. 30, 253 P.2d 867, *on pet. for reh.,* 258 P.2d 220 (1963); *McLean v. Truckee Carson Irr. Dist.,* 49 Nev. 278, 245 Pac. 285, 288-89 (1926); *Hillcrest Irr. Dist. v. Brose,* 24 Idaho 376, 133 Pac. 663 (1913); *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 Pac. 382, 383 (1913).

The history of *Hewes v. All Persons* demonstrates in the concrete the active federal utilization of state confirmation proceedings to secure certainty and finality in irrigation district contracts. Article 31 of the contract provided that "the United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision pending appellate

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38. *See* Cal. Water Code, §§ 23220 *et seq.*

action if ground for appeal be laid." Pl. Ex. 8, p. 25.[39] After such proceedings were initiated, the Bureau actively collaborated in carrying them forward. Commissioner Mead instructed the Bureau's district counsel to assist counsel for the irrigation district in prosecuting *Hewes*. Bureau officials in Washington conferred with District leaders as the suit advanced. *See*, LX-AP, LX-AR. District counsel for the Bureau kept the Commissioner informed of the progress of the suit, including the unfolding of Malan's allegations on acreage limitation. LX-AU, LX-AV, LX-AW, LX-AX, LX-BA, LX-BD, LX-BF, LX-BG, LX-BJ. The Comptroller General of the United States insisted that the judgment in *Hewes* become final before the federal government would act pursuant to the contract. LX-BH. And indeed, at this phase of the case, Malan's counsel presented his acreage limitation arguments directly to Harold Ickes, the new Secretary of the Interior. LX-BK. Finally, predicated on the finality of *Hewes* and the validity of the contract, the Department of the Interior sought appropriations from Congress to begin construction of the All-American Canal.

The judgment in *Hewes* was clearly grounded on an adjudication of the acreage limitation issue. Rejecting landowner Malan's attack on the validity of the contract, the court ruled that neither the contract nor "any law applicable thereto" limited "the delivery of water to any maximum

39. Although this language in Article 31 is similar to the language of § 1 of the Act of May 15, 1922 (43 U.S.C. § 511), the Contract's provision for judicial confirmation was not a requirement imposed by that Act. Rather, § 18 of the Project Act required compliance with state procedures, and California law required the confirmation action. As Commissioner Mead explained to Congress, the contractual requirement for judicial confirmation was "necessary under California law." *Hearings on H.R. 13710*, Sen. Subcomm. on Appropriations, 72nd Cong., 2nd Sess. 97 (1933).



acreage of land in a single ownership".[40] Under California law, the final judgment based on this holding bars relitigation of the validity of any issue properly considered. It forecloses "further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it

40. In its written opinon, the *Hewes* court stated:

> "Defendant Malan, the owner of 210 acres of land in Imperial Irrigation District, asserts that the contract is void because section 5 of the Reclamation Law provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner. . . .
>
> ". . . [S]*ection 5 of the Reclamation Law does not apply* in these proceedings. The Boulder Canyon Project Act provides a complete scheme for the construction of the Boulder Dam, the All-American Canal, and the dam diverting water from the Colorado River into the canal. . . . [T]he authority of Secretary with reference to delivery of water must be found in the Boulder Canyon Project Act and not in the Reclamation Law. Section 5 of the Boulder Canyon Project Act authorizes the Secretary to contract for the delivery of water 'under such general regulations as he may prescribe' and provides that 'contracts respecting water for irrigation and domestic uses shall be for permanent service. . . .' There is nothing in the statute or in the contract limiting the acreage to which water may be sold and delivered." LX-AZ, pp. 23-24 Pet. Apx. 124a-125a.

Similarly, in its Findings of Fact and Conclusions of Law, the court stated:

> "FINDING NO. 35
>
> "That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.
>
> ". . .
>
> "[CONCLUSION OF LAW] XI
>
> "That neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land in a single ownership." LX-BC, pp. 26, 32.

. . . [is] binding on the world at large. *Ivanhoe Irr. Dist. v. All Parties,* 47 Cal. 2d 597, 606; 306 P.2d 824, 829 (1957).

In order to avoid the *Hewes* judgment, the Ninth Circuit did not, and could not, deny the power of state courts to adjudicate federal questions, or reclamation law questions in particular.[41] Nor could it contest the fact that a confirmation proceeding, such as *Hewes,* results in an *in rem* judgment binding upon the world, including respondents. But, while paying lip service to the law of judgments, the court asserted that the *Hewes* court's ruling on the inapplicability of acreage limitation was "pure dicta" only "incidental and collateral" to the confirmation judgment. 559 F.2d at 526. This is so, according to the panel's opinion, because:

> "A decision that the Project Act incorporates the acreage limitation on private lands of the reclamation law into the contract would not make the contract invalid under federal law, *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed. 2d 1313 (1958), or California law. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 3 Cal. Rptr. 317, 350 P.2d 69 (1960)." *Id* at 525-26; Pet. Apx. 24a.

This hypothesis is dead wrong in its characterization of federal law and in its characterization of state law; moreover, it is a gross misapplication of the law of judgments.

First, as to federal law, the contract as written and approved by the voters deliberately omitted any acreage limitation and divestiture provisions. If the state court had concluded (consistent with the opinion of the court below) that the Project Act requires imposition of acreage limitation laws, the contract's intentional exclusion of § 46 acreage limitation provisions would have rendered it invalid

41. *E.g., Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 287 (1958); *Grubb v. Public Utilities Comm'n,* 281 U.S. 470, 476 (1930); *PI Enterprises, Inc. v. Cataldo,* 457 F.2d 1012, 1014-15 (1st Cir. 1972); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 325 (6th Cir. 1967); *Brown v. Chastain,* 416 F.2d 1012, 1014 (5th Cir. 1969).



under federal law for failure to comply with the statutory mandate.[42]

Second, as a matter of state law, it is clear that if the *Hewes* court had found that acreage limitations were mandated by the Project Act, it could not have implied such provisions into the contract because neither the District nor its voters had ever approved any such contractual obligations. The only action proper for the *Hewes* court would have been rejection of the original contract, leaving the District with the option of negotiating a new contract with express acreage limitation provisions which would then have to be submitted to the voters of the District for approval.[43]

Third, the Ninth Circuit's rationalization for labelling the *Hewes* decision "pure dicta" is patently contrary to the law of judgments. Even assuming that the inference drawn by the court from *Ivanhoe* were correct, the fact of the matter is that the *Ivanhoe* decision was not rendered until 1960. In the absence of any controlling authority, the *Hewes* court was free to conclude that application of acreage limitations would render the contract *invalid* under

42. Any inconsistency between the Project Act's requirements and the contract would have required the state court to declare the contract invalid. Thus, it was required to decide, in addition to the acreage limitation question — whether the terms of § 4(a) of the Project Act had been satisfied, LX-AZ, pp. 6-10; the legality under § 9 of the Project Act of the provisions in Article 23 of the contract regarding entry of public lands, LX-AZ, p. 26; the legality under § 4(a) of the Project Act of exclusion of any provision for construction of a canal to the Coachella Valley, LX-AZ, p. 28; and the applicability of § 4 of the 1902 Act, LX-AC, p. 31.

43. Needless to say, the requirement to comply with the state-law election procedure in the event of a change in the contract term was also imposed by § 18 of the Project Act which requires compliance with state laws. 43 U.S.C. § 617q. The federal government has never imposed an irrigation arrangement upon farmers without their consent. Thus, at the time, the Bureau's district counsel advised his superiors that any amendment of the All-American Canal Contract would require a new election to allow the District's voters to pass on such new terms. LX-BJ, p. 2.

state or federal law.[44] And in that event, a decision 25 years later would provide no basis whatsoever for attacking the state's court judgment. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *United States v. Moser*, 266 U.S. 236 (1924).

At bottom, the *Ivanhoe* case is proof of the error of the Ninth Circuit's proposition that acreage limitation issues are outside the legitimate scope of confirmation proceedings. *Ivanhoe* involved three confirmation cases which had been brought in state court under the same jurisdictional statute as *Hewes*.[45] The California courts had sustained objections made by dissident landowners challenging the applicability of acreage limitations, and had declared the contracts invalid under both federal and state law. On certiorari, this Court reversed, holding that under federal law acreage limitations were valid, and remanded the case to the California Supreme Court for a determination of the legality of such limitations under state law. Clearly, this Court, the California Supreme Court and the two trial courts in California were not engaged in a meaningless exchange of dicta which would have no binding effect. And just as clearly, neither was the *Hewes* court engaging in a frolic of dictum when it adjudicated Malan's claim in 1933.

## V. RESPONDENTS LACK STANDING

Under *Warth v. Seldin*, 422 U.S. 490 (1975), and *Simon v. Eastern Kentucky Welfare Rights Org'n*, 426 U.S. 26 (1976), Article III standing requires a showing that persons who would invoke federal judicial power have sustained a "particularized injury" that resulted "in a concretely demonstrable way" from the violations alleged. 422 U.S. at 504. The alleged injury must be "distinct and

44. According to Malan's brief to the California Supreme Court in *Hewes*, the District conceded that the contract as written would be *invalid* if federal law required acreage limitation. LX-BK, p. 19.

45. *Ivanhoe Irr. Dist. v. All Parties*, 47 Cal.2d 597, 306 P.2d 824 (1957); *Madera Irr. Dist. v. All Persons*, 47 Cal.2d 681, 306 P.2d 886 (1957); *Santa Barbara County Water Agency v. All Persons*, 47 Cal.2d 699, 306 P.2d 875 (1957).



palpable" (*id.* at 501) and it must be shown that "the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

When they moved to intervene to perpetuate this litigation after the Government's decision not to appeal, respondents failed to allege or offer evidence of any facts establishing a basis for standing. They filed ten short affidavits, each averring as follows:

> "I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District." I-CR 172, *et seq.*; Con. Apx. 327a, *et seq.*

An additional affidavit, that of respondent Yellen, asserted that "if the government had prevailed in this litigation the Applicants and persons similarly situated would *attempt* to purchase . . . the excess lands." I-CR 170. Yellen also averred that irrigated land in the District has a value of "$1,200.00 to $1,400.00 per acre", but "without water" could sell "for approximately $25.00 to $50.00 per acre." *Id.*[46]

46. Respondents also alleged that they were plaintiffs in a separate lawsuit, *Yellen v. Hickel*, which had been filed on May 1, 1969 and was pending before a different judge in the same district. In that action respondents sought a writ of mandamus requiring the Government to impose in Imperial Valley a provision in § 5 of the 1902 Act, which forbids the sale of individual water rights to any landowner who is not an "actual bona fide resident on such land." 43 U.S.C. § 431. On September 27, 1972, while the appeal from the order denying intervention in this case was still pending, a decision in respondents' favor was entered in the *Yellen v. Hickel* case, 352 F.Supp. 1300 (S.D. Cal.). An appeal had been taken in *Yellen v. Hickel* by the time a panel of the Ninth Circuit heard argument on the intervention issue in this case. In its August 6, 1973 order granting intervention in this case, the Ninth Circuit panel explained that it was allowing intervention to avoid the possibility of a final judgment on appeal in *Yellen v. Hickel* which would be inconsistent with a final judgment of the trial court in this case. Such potential inconsistency,

These conclusory averments, unsupported by factual detail, establish at most no more than a "generalized grievance shared . . . by . . . a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499. *Warth* is instructive on this point. There the plaintiffs based their standing on the contention that they had been unable to buy homes in the village of Penfield because the price of houses had been inflated due to allegedly restrictive and discriminatory practices followed by the village. They alleged that each had made specific, concrete efforts to purchase, and that their efforts had proven fruitless because the prices in Penfield were greater than they could afford. 422 U.S. at 503. This Court held that such facts did not establish a "particularized injury." Clearly, respondents in this case have shown even less in the way of "particularized injury." The unsuccessful plaintiffs in *Warth* were at least able to show specific instances of unsuccessful attempts to buy property. Here, respondents did not ever attempt to buy farmland in the Valley. There is no evidence or finding that any respondent was ever thwarted in efforts to buy farmland because of conditions attributable to the fact that acreage limitation was not imposed in 1933 or thereafter. Respondents' alleged desire to buy land in Imperial Valley at less than market price is thus no more than a commonly held sentiment, falling far short of the "distinct and palpable injury" that is

the panel explained, could only be avoided by creating a means for appellate review in both cases, and the only way to achieve that was to permit appellants to intervene to prosecute an appeal in this case. 559 F.2d at 543-44, Pet. Apx. 56a-57a. The panel did not consider whether respondents had met the minimum requirements for intervention specified in Rule 24 F.R.C.P., or whether the requirements for standing under Article III had been satisfied.

The court below heard consolidated argument on the merits in both this case and *Yellen v. Hickel.* The court first decided that plaintiffs lacked standing in *Yellen v. Hickel,* and that holding *ipso facto* eliminated the possibility of any inconsistency between a final judgment in *Yellen v. Hickel* and the trial court's judgment in this case. Thus, the only claimed reason for allowing intervention in this case disappeared. The court below ignored this fact and, then, inexplicably held that respondents have standing in this case notwithstanding their lack of standing in *Yellen v. Hickel.*



a prerequisite to the exercise of judicial power under Article III. *Warth v. Seldin*, 422 U.S. at 501.

In addition to their failure to show a particularized injury, respondents also failed to show that any relief sought from the court would in fact redress their claimed injury. Here again, *Warth* is instructive, for it emphasizes that there must be "an actual casual relationship" between the alleged wrong and the asserted injury such that the purported litigant "would benefit in a tangible way from the court's intervention." 422 U.S. at 507, 508. The Court in *Warth* emphasized that the record there was devoid

> "of any indication that [any contemplated housing project] would have satisfied petitioners' needs *at prices they could afford,* or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary — that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Id.* at 506.

Here, too, the record is devoid of any indication that enforcement of acreage limitation would result in gratification of respondents' amorphous desires to own land. As in *Warth*, respondents have not shown what prices they could afford. And whatever those prices might be, there is no showing that respondents could afford or would in fact pay such prices.[47] Whether tangible gratification of

47. While respondent Yellen averred that land without water would have a value of $25.00 to $50.00 per acre, the record clearly establishes that the owners of farmlands in the Valley have spent upwards of $200.00 per acre for the installation of elaborate subsurface tile drainage systems required to keep the land from becoming salt poisoned. *E.g.,* 4 Tr. 360. Even if these lands were appraised for § 46 divestiture at "preproject" dryland values, the appraised prices would have to include at least the cost of such permanent improvements. The record is devoid of any evidence that respondents could afford such prices, and, as in *Warth,* respondents' descriptions of their financial situations suggest that they could not afford such prices.

respondents' desires to own land would ever result from imposition of acreage limitation is, at most, sheer speculation. *Cf. Bowker v. Morton*, 541 F.2d 1347, 1350 (9th Cir. 1976).

The court below attempted to gloss over these glaring deficiencies in respondents' case by asserting that *if* respondents were to buy land in Imperial Valley today they would have to pay prices higher than they would pay if § 46 were applied to the private landowners in the area. 559 F.2d at 552, Pet. Apx. 16a. Thus, the court of appeals concluded that respondents' standing can be predicated solely on an interest in seeing land prices reduced generally, without requiring any proof of respondents' ability to purchase at those unspecified lower prices. The court characterized respondents' interest as "an interest only in reducing land prices, not an interest in reducing land prices to any specific level." *Id.* That reasoning flies directly in the face of this Court's holding in *Warth v. Seldin* that standing cannot be established by the mere allegation of an interest in seeing current market prices reduced.

Clearly, respondents do not have the sort of personal stake in this controversy that is needed to satisfy the test of standing. The record is devoid of any indication that any respondent "stand[s] to profit in some personal interest" from the outcome of this case. *Simon v. Eastern Kentucky Welfare Rights Org'n,* 426 U.S. at 39. They are seeking to invoke judicial power, not to redress demonstrably personal injury, but to obtain determination of a public issue. Such resort to the judiciary to obtain decision of "abstract questions of wide public significance" is precisely what the standing requirement of Article III is intended to prohibit. *Warth v. Seldin,* 422 U.S. at 500.



## VI. CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

CHARLES W. BENDER
PATRICK LYNCH
JAMES V. SELNA
JOHN F. DAUM
611 West Sixth Street
Los Angeles, California 90017
(213) 620-1120
*Attorneys for Petitioners*
*John M. Bryant, et al.*

*Of Counsel:*
O'MELVENY & MYERS

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